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Nos. 313 and 563.

In the

Supreme Court of the United States.

October Term, 1918.

GABE E. PARKER and GABE E. PARKER as Superintendent for the Five Civilized Tribes, W. M. BAKER and W. M. BAKER as Cashier for the Five Civilized Tribes, - - - - - *Appellants,*

VERSUS

EASTMAN RICHARD and R. D. MARTIN, Co-Administrators of the Estate of SAMUEL RICHARD, Deceased, - - - - - - - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

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BRIEF *of* APPELLEES.

Statement of the Case.

Samuel Richard was, during his lifetime, a full-blood citizen of the Creek Nation of the Five Civilized Tribes of Indians and as such citizen there was

duly patented to him by the Creek Nation 160 acres of land described as the

> Southwest Quarter of Section Four (4), Township Seventeen (17) North, Range Seven (7) East, located in Creek County, State of Oklahoma.

On April 13, 1912, Samuel Richard being then a minor, acting through his legal guardian, made, executed and delivered an oil and gas mining lease covering the above described lands to the Kathleen Oil Co. as lessee. The lease was duly approved by the County Court having jurisdiction of said minor and also approved by the Secretary of the Interior, for the reason that Samuel Richard was a minor full-blood Creek Indian and his allotment of land was inalienable during his lifetime and a lease upon same during Samuel Richard's lifetime then required the approval of the Secretary of the Interior.

Under the terms of the lease it was provided that lessee should pay to the United States Indian Superintendent for the use and benefit of said lessor, as royalty, the sum of 12½% of the gross proceeds of sale of all crude oil extracted from the land, but it was further provided in the lease that in event restrictions on alienation should be removed from the land the lease shall be removed from the supervision of the Secretary of the Interior and that such release

would take effect without further agreement from the date the restrictions were removed and that thereupon the authority and power delegated to the Secretary of the Interior should cease, and further, that all payments required to be paid to the United States Indian Superintendent, should thereafter be made to the lessor, or the then owner of the lands.

The lessees entered in and upon the lands, drilled for oil and found same in large paying quantities and during the lifetime of Samuel Richard paid royalty moneys amounting to approximately $175,818.67 to the United States Indian Superintendent for the use and benefit of said Samuel Richard.

Thereafter on January 24, 1916, the allottee, Samuel Richard, died, leaving his father, Eastman Richard, as his sole heir. Thereafter Eastman Richard, the heir of Samuel Richard, petitioned the County Court of McIntosh County, Oklahoma, for the appointment of himself and R. D. Martin as co-administrators of the estate of Samuel Richard, deceased, and thereafter on February 29, 1916, plaintiffs, Eastman Richard and R. D. Martin, were appointed as such administrators by said County Court; they executed and delivered their joint and several administrator's bond, according to law, in the penal sum of $225,000.00 to faithfully discharge their duties as such administrators, and said bond was duly approved by said County Court and letters of adminis-

tration were duly and legally issued to plaintiffs as administrators of the estate of Samuel Richard, deceased. (Rec., p. 6.)

Thereafter on March 1, 1916, Eastman Richard as sole heir of Samuel Richard, and plaintiffs as administrators of said estate of Samuel Richard, deceased, by and with consent of the lessee and owner of said lease, revoked, renounced, cancelled and terminated the appointment of said defendants as trustees under said lease to further collect royalties accruing from said lands and notified said defendants thereof and requested the defendants to pay to plaintiffs the moneys collected by them from said lease both prior to the death of Samuel Richard as well as the moneys collected since the death of Samuel Richard on January 24, 1916, up to said March 1, 1916, but the defendants declined to do so.

The plaintiffs claimed that upon the death of the allottee, Samuel Richard, on January 24, 1916, that the restrictions against alienation of said lands ceased; that Eastman Richard as heir of Samuel Richard has the legal right to alienate said inherited lands without approval of the Secretary of the Interior; and that the right of the Secretary to supervise the lease ceased and the right of the defendants to withold moneys representing proceeds of sale of oil extracted from the land also ceased after the death of Samuel Richard, and that plaintiffs, as such ad-

ministrators of said estate, are entitled to collect said moneys for the use and benefit of Samuel Richard's heir, Eastman Richard. Plaintiffs thereupon filed this suit in the District Court of Muskogee County, State of Oklahoma, seeking to collect from the defendants the moneys belonging to the estate of Samuel Richard, deceased, which the defendants collected prior to the death of Samuel Richard in the approximate sum of $175,818.67, and also seeking to collect for said estate the moneys collected by the defendants after the death of Samuel Richard and prior to the institution of this suit, in the approximate sum of $50,000.00, and also seeking to enjoin the defendants from interfering with the collection by plaintiffs of the moneys accumulated since the institution of this action and moneys that will continue to accumulate from the sale of oil extracted from the land since the death of Samuel Richard, and also seeking to require the defendants to render to plaintiffs an accounting of all such moneys collected. (Rec. pp. 1-7.)

Thereafter the defendants removed said cause to the United States District Court for the Eastern District of Oklahoma and on August 30, 1916, filed their answer admitting all the material facts alleged by plaintiffs, but denied, as a matter of law, that the death of Samuel Richard removed restrictions against alienation of the land and denied that the de-

fendants had no lawful right to withhold the moneys collected by them prior to the death of Samuel Richard and also denied that the defendants had and have no lawful right to continue to collect the royalty moneys representing sale of oil extracted from this land, since the death of Samuel Richard. (Rec., pp. 8-31.)

Thereafter the case was submitted to the District Court and the District Judge rendered his opinion and filed same on September 14, 1916, (Rec., pp. 32-36), and on September 21, 1916, made and entered a decree in favor of the defendants and against the plaintiffs, to all of which plaintiffs duly excepted. (Rec., pp. 37-38.)

Thereafter the plaintiffs appealed to the United States Circuit Court of Appeals of the Eighth Judicial Circuit, from the judgment of the District Court. (Rec., pp. 38-42.)

Thereafter, the case was duly submitted, argued and considered in the said Circuit Court of Appeals and on August 21, 1917, the Circuit Court reversed the judgment of the District Court, and filed its opinion in the case (Rec., pp. 43-46) and on Sept. 3, 1917, entered its decree reversing the judgment of the District Court, and ordered the same remanded to the said District Court, with directions to enter a decree for complainant. (Rec., p. 47.)

From the judgment and decree of the Circuit Court of Appeals the defendants appealed to this court, as is shown by the record in case No. 313.

Thereafter on the 28th day of Feb., 1918, as directed by the decree of the Circuit Court of Appeals, the United States District Court at Muskogee made and entered its decree and judgment in favor of the complainants, and against the defendants, directing the defendants to pay to the plaintiffs $119,621.32 in money and to deliver to them $162,000.00 in Liberty Bonds and to account to them for all other notes and mortgages and etc., received and collected from the Samuel Richard allotment and enjoining them from thereafter supervising or controlling same, or receiving money from the sale of oil extracted therefrom. (Rec., p. 37. No. 563.)

From this judgment and decree the defendants again appealed to the Circuit Court of Appeals (Rec., p., 40, No. 563) and thereafter on May 20, 1918, the plaintiffs filed their motion to dismiss said second appeal in the Circuit Court of Appeals, which, after being heard by said Court and thereafter on May 28, 1918, the said Circuit Court of Appeals, after the filing of defendant's response (Rec., p. 51, No. 563), and the hearing of the argument thereon, did, dismiss the said second appeal (Rec., p. 54, No. 563), from which order of the said Circuit Court of Ap-

peals, the defendants again appealed to this court, which is case No. 563.

The appeals from the District Court to the Circuit Court of Appeals and from the Circuit Court of Appeals to this court, as shown in the record of case No. 563, were taken by the defendants for the only purpose of delaying plaintiffs from securing possession of the funds and benefits of the judgment rendered in their favor, hence the determination of these cases depends upon the record of case No. 313, to which record reference will be made in the argument on the legal questions involved.

ARGUMENT.

May It Please the Court:

I.

Upon the death of Samuel Richard on January 24, 1916, all restrictions against alienation of the lands constituting his allotment were removed.

II.

The amendment to Rule 25 promulgated November 29, 1912, after the execution of the lease,

was and is unenforceable as against the lessor and his heirs, because the amended rule attempts to change the terms of the lease contract.

III.

Upon the death of Samuel Richard on January 24, 1916, all governmental supervision over the lease on his allotment of land ceased, even tho', as a matter of law, all restrictions as to alienation are not removed.

So far as we have been able to learn, the questions involved in this case have never before been directly presented to, nor passed upon, by this court, and the issues herein involved are now for the first time presented here for a determination.

I.

Repeating our First Proposition:

We think that upon the death of Samuel Richard on January 24, 1916, all restrictions against alienation of the lands constituting his allotment were removed.

Before the lands were allotted to the Indians of the Five Civilized Tribes a Treaty was entered into known as the Original Creek Treaty (31 Stat. L. 861)

which was approved March 1, 1901. It was then the intention of all parties, in providing for the protection of the Indian, that the individual allotments made to the living allottees should remain inalienable for at least five years. It was therefore provided in the treaty as follows:

Sec. 7 of Act of March 1, 1901 (31 Stat. at L. 861):

> "Lands allotted to citizens hereunder shall not in any manner whatsoever, at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands *shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.*"

This provision was reenacted, of course, in the Supplemental Creek Treaty (32 Stat. L. 500), effective August 8, 1902, by Section 16 thereof which reads as follows:

> "Lands allotted to citizens shall not in any manner whatever, or at any time be encumbered, taken or sold, to secure or satisfy any debt or obligation nor be *alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior.*"

By this legislation each enrolled Indian of the Creek Nation of the Five Civilized Tribes received his allotment of land which was not alienable under the terms of these treaties for five years, both while the lands were owned by the allottee or his heirs, when the allottee received his allotment during his lifetime. These restrictions against alienation then applied to all allottees including Indians of every degree of blood as well as freedmen allottees, and also applied to the heirs for the full five-year period commencing with August 8, 1902. Even at that time however there was a class of these allotted lands which Congress even then deemed it wise to permit be alienable by some of the Indians of the Five Civilized Tribes; that is all allotments of citizens of said tribe who were living April 1, 1899 and entitled to be enrolled but who died since that time before receiving their allotments. Such allotments of lands were patented to the *heirs* of such deceased allottee and were granted to such Indian heirs *free of all restrictions* as provided in Section 28 of the Original Creek Treaty, approved March 1, 1901, *supra.* Section 28 is as follows:

> "*Sec. 28* * * * All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the

people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

See also:

Rentie v. *McCoy*, 128 Pac. 244;

Mullen v. *U. S.* 224 U. S. 448, 56 L. ed. 834;

Welty v. *Reed*, 231 Fed. 930.

As the Indian Territory became more inhabited and settled, and as Indian allottees became more accustomed to living and transacting business in the same manner as the other citizens of this country did who were not members of the Five Civilized Tribes, but who were their neighbors and business

associates, Congress realized and then decided it was wise to release another class of these then restricted Indian citizens of the Five Civilized Tribes from this binding provision of the treaty which prevented alienation of their lands and therefore passed a law removing all restrictions on alienation on all of the surplus allotments of lands of adult allottees of the Five Civilized Tribes, who were not of Indian blood. This provision removing restrictions against alienating surplus allotments of certain classes of allottees of the Five Civilized Tribes was inserted in the Indian Appropriation Act (33 Stat. L. 189) and approved April 21, 1904, and reads as follows:

> "*And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed,* and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian Agent at the Union Agency in charge of the Five Civilized Tribes if said agent is satisfied upon a full investigation of each individual case, that such removal of restrictions is for the best interest of said allottee."

This removed restrictions against alienation of surplus lands of all adult allottees of the classes named both while owned by the living allottee as well as his heirs. It will be noted that this removal of restrictions was made by Congress less than two years after the passage of the Supplemental Creek Treaty and more than three years before the five-year period of restrictions against alienation, as provided for in the Supplemental Creek Treaty, would have expired.

Later Congress, still pursuing its wise policy of removing restrictions against alienation of allotted lands step by step, and only two years after the passage of the 1904 act, *supra*, then in April, 1906, realizing the rapid growth of civilization and development made in this country by the Indians, again passed another law which removed all restrictions on all lands of all allottees immediately upon the death of any allottee of the Five Civilized Tribes, but specified a mode of conveyance in the sale of such inherited lands if any heir of such deceased allottee be a full blood; that is that his conveyance should be approved by the Secretary of the Interior. That portion of the Act of 1906 (34 Stat. L. 137), is as follows (Sec. 22):

> "That the adult heir of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or

patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

It will be observed that this in effect provided that upon the death of the allottee *all restrictions* as to alienation were removed, and that heirs of deceased allottees were given the right to alienate. The heirs of full-blood degree could also sell their inherited lands, but a mode or manner was specified by which their conveyance should be executed, by specifying that when such sale be made their conveyance should be approved by the Secretary of the Interior.

This clearly shows the intent of Congress to gradually remove restrictions against alienation on certain classes of Indians as rapidly as conditions in this country justified.

The development and settlement of this country became so rapid in advancement that conditions justified the granting of statehood to the inhabitants of Indian Territory, and we were admitted as a state to the Union on November 16, 1907.

After the citizens of this country had enjoyed the rights and privileges of statehood and after State Government had been in full sway for less than two years, Congress still pursuing its wise policy of removing restrictions from lands of these Indian citizens, then not only removed all restrictions against alienation of lands of the major portion of the remaining restricted Indian citizens by removing *all* restrictions, on all lands of allottees, enrolled as intermarried whites, and freedmen, as well as lands of *all* Indians having less than one-half degree of Indian blood, but also removed all restrictions on all surplus lands of allottees of mixed-blood Indians of one-half or more, and less than three-quarter blood.

Paragraph 1 of Act of May 27, 1908 (35 Stat. L. 312), is as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads

of said allottees enrolled as intermarried whites, as freedmen, and as mixed Indian blood having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees, enrolled as mixed-blood Indians having half or more than half and less than three-quarter Indian blood *shall* be free from all restrictions. * * *."

In addition to this, realizing all restrictions had been removed on the death of the allottee by Sec. 22 of Act of April 26, 1906, and in order to place supervision over the conveyances of Indian heirs of full bloods with the local government, Congress also inserted in Act of May 27, 1908, Sec. 9, providing that conveyances of Indian heirs of full blood (which theretofore were subject to approval by the Secretary of the Interior) could thereafter be approved by the State Courts.

Sec. 9 of Act of May 27, 1908 (35 Stat. L. 312), reads:

Sec. 9. "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

This had the effect of *rescinding all supervision of the Secretary of the Interior or of any United*

States Government official over this class of conveyances, and designated that the state courts, to-wit: County Courts, should superintend conveyances of such class of lands.

Under the provisions of Sec. 9 of this act immediately upon the death of the allottee, his heirs, even though they were of full Indian blood, could and can now, sell the lands so inherited by them, free of all supervision or control of the Secretary of the Interior. Under the provisions of this act, the Secretary has no further jurisdiction after the allottee's death. Immediately upon the allottee's death all authority of the Secretary of the Interior over this class of lands ceased.

The foregoing legislation shows a comprehensive and consistent policy on the part of Congress to gradually remove the restrictions on alienation of allotted lands, and to give the Indian citizens the same rights and privileges as enjoyed by other citizens in the State of Oklahoma, by relieving these Indian citizens from the burden of federal jurisdiction, as rapidly as conditions justified.

Not only were restrictions removed from lands inherited by full-blood Indian citizens by these acts (*Hope* v. *Foley*, 157 Pac. 770; *Sampson* v. *Staples*, 155 Pac. 213), but the plain intent of Congress that this should be done is evident by this series of legis-

lation which gradually removed restrictions step by step.

Besides this it was generally understood by the Secretary of the Interior and federal officials in charge of the supervision of the Five Civilized Tribes that all federal supervision and control over this class of lands (to-wit, lands inherited by Indians of full blood upon death of their ancestors) was abrogated or rescinded by Act of May 27, 1908, *supra.*

Immediately after the passage of the Act of May 27, 1908, *supra,* the Secretary of the Interior on June 20, 1908, re-promulgated rules and regulations to govern leasing and sale of lands of all classes of restricted Indians, *but made no rule or regulation whatever applying to lands inherited by full-blood Indians upon the death of the allottee, because it was considered that Sec. 9 of Act of 1908, removed all restrictions so far as supervision of the Secretary was concerned immediately upon the allottee's death.* In fact the Secretary of the Interior in re-promulgating these rules and regulations, on June 20, 1908, to conform to the new provisions contained in Act of 1908, made specific rules and regulations for releasing all governmental supervision over leased lands from which restrictions were removed by the terms of the act. (See rule 42 C. on page 18 of Rules and Regulations adopted by the Secretary of the Interior, reprint of June 1, 1916.)

The Act of 1908, in Sec. 1, removed all restrictions against alienation of lands of minor Indian allottees, of less than half degree of blood, but also in section 2 provided that lands of minor allottees are subject to the jurisdiction of the Probate Courts of Oklahoma, until the minor, if a male, becomes 21 years of age, if a female, 18 years of age, according to the Enrollment Records. This Act of 1908 in Sec. 9 removed all restrictions against alienation of allotted lands, upon the death of the allottee, and provided that conveyances of heirs of full blood shall be approved by the County Courts of Oklahoma. In other words, all the restrictions against alienation of lands of minor Indian allottees of less than half degree of blood were removed, as was also all restrictions against alienation of lands inherited by full bloods removed, but in each instance jurisdiction was granted to the County Courts to approve the conveyances.

The lands of these classes of minors are not "*restricted*" lands. They are alienable. So also are lands inherited by full-blood Indians alienable.

The Secretary of the Interior has no power to supervise a sale or lease of lands of these minors. It is granted to the County Court. The Secretary of the Interior has no authority to supervise the sale or leasing of lands inherited by full-blood Indians, this is granted to the County Court. The Secretary of the

Interior or United States Indian Agent has no authority to collect or withhold from this class of unrestricted minors, moneys derived from sale of oil extracted from these lands, even though the lands were leased before the removal of the restrictions. Neither has he authority after the death of the allottee to collect or withhold moneys collected from sale of oil extracted from lands leased by full-blood Indians before the death of the allottee. Under Sec. 1 of Act of 1908 restrictions were removed from the class of minor lands named. Under Sec. 9 of Act of 1908 the restrictions were removed from the lands upon the death of the allottee, even though the heir is a full blood. In either case the County Court is charged with the jurisdiction, although the restrictions are removed from both classes of land. *In neither case has the Secretary of the Interior or the United States Indian Agent any further jurisdiction.*

At the time the lease covering the allotment in question was executed by Samuel Richard, by his legal guardian, on April 12, 1912, upon a departmental form of lease, the law giving the Secretary of the Interior power to approve leases for oil and gas purposes, executed by living full-blood Indians, was contained in Act of Congress, May 27, 1908, *supra.*

Prior to May 27, 1908, the authority given to the Secretary of the Interior to approve such leases was

contained in the Supplemental Creek Treaty, as follows:

Sec. 17 of Act of Congress, approved June 30, 1902 (32 Stat. L. 500):

> "Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than five years for agricultural purposes, and *leases for mineral purposes*, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Sec. 2 of Act of Congress, May 27, 1908 (35 Stat. L. 312):

> "*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult; or by the guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years without the privilege of renewal; PROVIDED, *That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for*

periods of more than five years, may be made, with the approval of the Secretary of the Interior and not otherwise; AND PROVIDED FURTHER, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions and the term minor, or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

It will be observed that under these provisions of law that the Secretary of Interior was given the power and authority to approve leases for oil and gas mining purposes on lands of living full-blood allottees, and the lease executed by Samuel Richard, during his lifetime on April 12, 1912, provided among other things as follows:

(Paragraph 2.) "The lessee hereby agrees to pay or cause to be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma, *for the lessor,* as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil."

(Paragraph 8.) "This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: *Provided, however,* that no regulations made after the approval of this lease, affecting either the length of term

of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease."

(Paragraph 12.) *"In event restrictions on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement,* from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior shall cease, and all payments required to be made to the United States Indian Superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the Eufaula National Bank, of Eufaula, Oklahoma, or at such other places as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease."

It will be observed that under the terms of the Acts of Congress and the terms of the lease itself it was not contemplated that the Secretary of the Interior should execute the lease itself, but that he should approve the lease after it had been executed by the Indian, and that the rents and royalties accruing under the terms of the lease should be paid to the

United States Indian Superintendent at Muskogee, *for the lessor.* It was not contemplated that moneys arising from this lease should be paid to the lessor direct, but that same should be paid to the United States Indian Superintendent *for the lessor.* This was done in order that the United States Indian Superintendent could superintend the collection of the rents and royalties and see that the lessor received all moneys that became due under terms of this lease.

This is all that was contemplated. After the United States Indian Superintendent collected this money he had no authority to refuse to pay it to the Indian lessor. He was merely named in the lease as a depository where the royalties from the lease were to be paid for the lessor—the same as it is provided in Sec. 12 of the lease that "after restrictions are removed and supervision of the Secretary of the Interior over the lease is relinquished, that the royalties should be deposited to the credit of the lessor at the Eufaula National Bank at Eufaula, Oklahoma, etc."

In fact, the rules and regulations adopted by the Secretary of the Interior provided only for the collection of the money and re-deposit of same in name of the adult lessors, as per rule 20, and where the lessors are minors, as provided for in rule 25:

> "*20.* All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to

the United States Indian Agent at Union Agency, Muskogee, Okla., or to such other person as may be designated by the Secretary of the Interior, for the benefit of the lessors, or, in cases of minors and incompetents, shall be deposited as hereinafter specified. (See amendment of July 23, 1910, as to minors and incompetents, p. 31.)"

"*25.* All royalties, rents, or payments accruing under any lease made for oil or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer, to whom paid, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian Agent, in sums not exceeding $50.00 per month unless otherwise ordered by the court. Sums in excess of $50.00 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior, guaranteeing the safe care and custody of the funds so deposited. (Amended July 23, 1910. See p. 31.) (Amended Nov. 29, 1912. See p. 38.)"

It will thus be observed that prior to the passage of the Act of May 27, 1908, the Secretary of the Interior promulgated general rules and regulations to govern leasing of restricted lands of Indian citizens and prescribed form therefor.

After the passage of Act of May 27, 1908, and on June 20, 1908, the Secretary of the Interior re-promulgated these rules with appropriate changes to conform to the provisions of the Act of May 27, 1908. These rules and regulations were adopted by him and printed in pamphlet form, but they contained no provision relative to leasing of inherited lands of full-blood heirs, for at that time the Department did not consider it had any jurisdiction whatsoever to supervise such leases.

On the other hand his rules made specific regulations for *relinquishing* supervision over leased lands from which restrictions were removed, as follows:

Paragraph 42-c of Rules and Regulations of Secretary of Interior, page 18:

> "*All leases executed and approved heretofore or hereafter on land from all of which restrictions against alienation have been or shall be removed, even if such leases contain provisions authorizing supervision by this Department shall after such removal of restrictions against alienation be operated entirely free from such supervision, and the authority and power delegated to the Secretary of the Interior in said leases shall cease, and all payments required to be made to the United States Indian Agent shall thereafter be made to lessor or the then owner of said land,* and changes in regulations thereafter made by the Secretary of the Interior ap-

plicable to oil and gas leases shall not apply to such leased land from which said restrictions are removed, except where a bond is required in said lease it shall be furnished with responsible surety, unless the giving of said bond is waived by lessor or the then owner of the land." (Amended Aug. 12, 1908.)

Amendment is as follows on page 30 of Rules and Regulations:

"ORDER OF AUGUST 12, 1908.

"The following provision has been adopted by the Department for the relinquishment of supervision of leases approved by the Secretary of the Interior on lands from which the restrictions have been removed:

'That under section 42 of the Revised Leasing regulations of April 20, 1908, in cases where the restrictions are removed where the Department is to relinquish supervision as provided in said section, the Indian Agent at Union Agency will notify the lessees that before such supervision is relinquished, unless a new bond is waived by the lessor or owner of the land, as the regulations authorize the lessees must furnish a bond running to the lessor, his heirs or assigns, in the same amount as originally required where such bond was made to the United States, and when such bond is filed with the Indian Agent, examined by him and the surety found to be satisfactory, it shall be forwarded to the lessor, his heirs or as-

signs, and both parties will thereupon be notified that the Department will not longer exercise supervision over the lease and the surety upon the original bond running to the United States will be notified that it will only be liable for such obligations as accrued prior to the date of the new bond'."

Complying with the intent of Congress in its enactment of Sec. 9 of Act of 1908, the Department relinquished all federal supervision or control over leasing or sale of lands inherited by full-blood Indian heirs.

Under these rules promulgated and adopted by the Secretary of the Interior, supervision was rapidly relinquished by the Department over a large number of leases where the lessor died, leaving full-blood heirs (exactly similar to this case). Interested parties were advised by the Department that the Department no longer exercised supervision over same. The royalties sent to the Indian Agent by the lessees were paid to the heirs or returned to the lessees with instructions "that they pay the same to parties entitled to receive them."

Acting under the plain provisions of the terms of Sec. 9 of the Act of May 27, 1908, *supra*, which removed all supervision on the part of the Secretary of the Interior, or on any other federal officers over leases or conveyances on lands inherited by Indians

of full blood, and acting further on the instructions given out by the Department to the various lessees, to the effect that the Department had no further supervision or control over such class of leases and lands, and also acting on the refusal of the Department to thereafter receive payment of rents or royalties accruing on leases after death of the lessor, even where the leases had been executed by allottees during their lifetime under the supervision of the Secretary of the Interior, thousands of leases have been taken in this country upon lands inherited by full-blood heirs since the passage of Act of May 27, 1908, and without supervision of the Secretary of the Interior, or any federal officer, and the bonuses paid for such leases, and the rents and royalties accruing from the sale of oil extracted from such lands covered by said leases, *have been paid direct to the full-blood Indian lessor.*

In this connection permit us to invite the court's attention to the last paragraph of the letter written by former Acting Indian Superintendent, R. S. Cate on page 84 of this brief, which we just received before sending this brief to the printer and which speaks for itself.

It has been held by decisions of both state and federal courts, that the Secretary of the Interior had no jurisdiction or control over such classes of leases, after the Act of May 27, 1908.

—*United States* v. *Knight*, 206 Fed. 145;

MaHarry v. *Eatman,* (Okla.) 116 Pac. 935;
Sampson v. *Staples,* 155 Pac. 213;
Nicholas v. *Cornelius,* 152 Pac. 831.

The court in its opinion in the *MaHarry* v. *Eatman* case, *supra,* says:

> "The approval of the Secretary of the Interior was not necessary to the validity of the deed of full-blood Indian heirs executed September 16, 1909, whose ancestor died August, 1901, the approval of the court having jurisdiction of the settlement of the ancestor's estate being all that is required by section 9, Act of May 27, 1908, c. 199, 35 Stat. 315."

In our case the County Court having jurisdiction of the settlement of the estate of Samuel Richard has taken jurisdiction over the land and estate of Samuel Richard and appointed the plaintiffs as administrators over this estate; the plaintiffs have qualified and given surety bond in the sum of $225,000.00 approved by the County Court, and we think the moneys held by the defendants should be turned over to the plaintiffs in order that the County Court may exercise its jurisdiction over this estate and make a decree of distribution of the estate to the heir or heirs lawfully entitled as contemplated by Congress. The defendants lost all jurisdiction upon the death of Samuel Richard. Thereafter the jurisdiction over the land and estate is charged upon the

County Court having jurisdiction of the settlement of the estate of the deceased allottee.

The power of supervision by the Secretary of the Interior granted him by section 22 of the Act of April 26, 1906, was cancelled and repealed by Sec. 9 of the Act of May 27, 1908. The Act of May 27, 1908, repealed Sec. 22 of the Act of 1906. See case of *Henley* v. *Davis*, (Okla.) 156 Pac. 337, in which the court says:

> "The Act of Congress approved May 27, 1908, * * * is a revising act and was intended as a substitute for all former acts relating to the subject of restrictions, and operated to repeal the provisions of an Act of Congress approved April 26, 1906, * * * and previous Congressional enactments in conflict therewith on the same subject."

In the case of *Hope* v. *Foley*, 157 Pac. 727, the Oklahoma Supreme Court says:

> "After the Act of May 27, 1908, became effective the Secretary of the Interior had no authority to approve conveyances of Indian lands of full-blood Indians."

We say *if the Secretary of the Interior has no authority to approve a sale of the lands, after the death of the allottee, that the Secretary of the Interior has no power to collect the moneys accruing from sale of oil extracted from the same land after the death of the allottee, and that therefore, the defend-*

ants are not entitled to hold the money sued for by plaintiffs in this action.

If Eastman Richard, as heir of Samuel Richard, can sell the entire fee in this land inherited by him and collect the purchase price therefor without sanction, supervision or approval of the Secretary of the Interior because the death of Samuel Richard operated to remove all departmental supervision over this land, Eastman Richard is entitled to collect the daily royalties accruing from the sale of oil extracted from the land since the death of Samuel Richard.

It is admitted by all parties that a lease or conveyance executed after Act of May 27, 1908, by an Indian of the Five Civilized Tribes, of the full blood, to lands inherited by him, may be executed by the Indian lessor without any supervision or control whatsoever of the Secretary of the Interior. The full-blood Indian heir collects the bonus for the lease. The rents and royalties accruing under the lease or purchase price for the sale of his land, as the case may be, are paid direct to the full-blood Indian heir, without any supervision. He collects these royalties the same as any other person owning leased land.

Thousands upon thousands of leases have been taken and executed covering inherited land by full-blood Indians with the approval of the County Court

having jurisdiction of the settlement of estate of the deceased allottee under the plain provision of Sec. 9 of Act of May 27, 1908, *supra,* and all moneys paid direct to the Indian lessor. Can it be consistently contended that because the Secretary of the Interior had supervision of this lease before the death of Samuel Richard, that he still retained lawful supervision ever after the death of the allottee? This certainly is an absurdity. Eastman Richard today, as the sole heir of Samuel Richard, although he be a full-blood, can sell the lands covered by the lease in question, and receive probably half a million dollars for the absolute fee simple title to the land in question, and all that is necessary is that his conveyance be approved by the County Court of McIntosh County, Oklahoma. The Secretary of the Interior need not approve his sale, nor can he prevent him from selling. If this can be done (and it is admitted that it can) without the supervision or control of the Secretary of the Interior who has neither the power nor the authority to prevent the Indian from leasing or selling his lands, can it be consistently claimed that the Secretary of the Interior can continue to collect the daily rents and royalties accruing from this land, and withhold the same from Eastman, the heir and owner? We think not!

After the passage of the Act of May 27, 1908, and after the lease on the lands in question had been

taken, the Secretary of the Interior amended Rule 25 of the rules and regulations by adopting the following rule on November 29, 1912 (quoting from page 38 of Rules and Regulations):

> "*Provided, however,* that the said superintendent, or other officer in charge of the Union Agency, is authorized in his discretion, where considered for the best interests of any adult, minor or incompetent lessor, or his or her heirs, for whose account royalties, rents or payments accruing under any lease have been paid to said superintendent to withhold the disbursement of such royalties, rents or payments, wholly or in part from any such adult, or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs."

It is claimed by the Department now, by reason of adoption of this rule, that the Department has the right now not only to withhold from the heirs of Samuel Richard the moneys which were collected under the lease by the Department prior to the death of Samuel Richard, but it is further claimed that the Department still has the right to continue to collect royalties accruing from the lands in question, at the present time, although Samuel Richard died in January, 1916. Even this claim was not made by the Department at the time it adopted the amended Rule in November, 1912, but this claim was for the first time

made by the Department in 1915—three years after its adoption.

No proper construction that can be given to this rule and regulation above quoted gives the Department any authority or jurisdiction to collect royalties accruing from leased lands after the death of the allottee. The amended rule does not even attempt to provide that after the death of the allottee that the Indian Superintendent can *continue to collect royalties.*

The entire fee in the land can be sold by the Indian heir and the purchase price in its entirety can be collected by the Indian heir without supervision or control of any government official. The Secretary of the Interior can neither say yea nor nay as to whether the heir can sell the land. He has no supervision or control over it whatsoever. This is admitted by all parties. Is it consistent to claim that although Eastman Richard has a right to sell the fee simple title to land in its entirety, and collect the purchase price of it (without the supervision of the Secretary of the Interior) that if he does not sell the fee in his land he cannot collect the rents and royalties daily accruing from the lands? And that the Secretary of the Interior can collect and hold same? We think not! This, we say again, is an absurdity.

The amendment to Rule 25 adopted November 29, 1912, by the Secretary of the Interior, does not authorize the United States Indian Superintendent to continue to collect royalties from this land AFTER the death of Samuel Richard, or to refuse to pay to the plaintiffs the money collected BEFORE the death of Samuel Richard, because section 9 of Act of May 27, 1908, operates to remove all restrictions against alienation of the land or at least rescinded all supervision over same by the Secretary of the Interior, and the Secretary of the Interior has no lawful power to adopt a rule or regulation giving him authority in excess of that prescribed by Acts of Congress; he cannot by a ruling make lands and moneys restricted which by Acts of Congress are free from restrictions. He cannot, by his own ruling give himself authority to supervise lands from which his supervision is rescinded by Act of Congress.

The rules and regulations adopted by the Secretary of the Interior can give to the Secretary of the Interior no authority or right to supervise leases except on those lands which are specifically restricted by the Acts of Congress, that is those lands which are *"inalienable"* by the Indian, until *"restrictions against alienation"* of the lands are removed by an *order of the Secretary of the Interior.*

In other words, the Secretary of the Interior has only the specific right to promulgate rules and

regulations to apply to leases on lands *which are restricted under the terms of the Acts of Congress.* Any rule or regulation that may be adopted by the Secretary of the Interior which attempts to give him authority to supervise or control leases on lands from which restrictions have been removed, or from which Government supervision has ceased is a nullity and void, and without any binding force whatever.

It was not the intention of Congress that lands inherited by Indians of full blood should be classed as restricted lands after passage of Act of May 27, 1908.

By an examination of Sec. 1 and Sec. 9 of Act of May 27, 1908, it will be noted that it was the intention of Congress by the enactment of this act to remove restrictions from the major portion of lands of the members of the Five Civilized Tribes. In section 1 it provided for the removal of restrictions from all allotments of allottees having less than half Indian blood and also from certain lands of all allottees enrolled as mixed blood, and Indians having one-half or more and less than three-fourths Indian blood.

Section 9 reads as follows:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land; *Provided,* That no conveyance of any in-

terest of any full blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood, shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior, in the manner provided in section one hereof, for the use and benefit of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions; *Provided further,* That the provisions of section twenty-three of the Act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

By this provision Congress removed all restrictions on lands of the allottee immediately upon his death, but provided the manner in which conveyances of full-blood Indian heirs should be made. (*Sampson* v. *Staples*, 155 Pac. 215.) In construing the pro-

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visos in the same section it will be seen that it was not the intention of Congress to consider that the land inherited by full-blood adult Indian heirs should be classed as restricted land, nor was it considered that the provisos requiring the approval of the County Court to deeds of conveyances of full-blood Indian heirs, would be classed as a restriction, because in the next proviso, Congress provided that if any member of the Five Civilized Tribes of half or more than half Indian blood shall die leaving issue born after March 4, 1906, that the homestead of said deceased allottee *shall remain inalienable unless* restrictions against alienation be removed by the Secretary of the Interior in the manner prescribed in section one; that is the said homestead would be inalienable and remain for the use and support of said issue during their life, or lives until 1931; and then further provided that if no such issue survived then said allottee, if an adult, has the right to dispose of his homestead by will free from all restrictions, and also further provided that in the event no such issue survive which were born after March 4, 1906, and the homestead is not willed by the allottee, during his lifetime, or if issue were born after March 4, 1906, and such issue should die before April 26, 1931, that the lands should descend to heirs according to laws of descent and distribution of Statutes of Oklahoma, free from *all restrictions.*

It is then seen that the restrictions placed upon the manner in which conveyances of lands inherited by full-blood heirs should be executed (if it be classed a restriction) is not a federal restriction. Neither the federal government nor the Secretary of the Interior has any power whatsoever in the premises.

It will be observed, by an examination of all of the Treaties and Acts of Congress, pertaining to the lands of the Five Civilized Tribes of Indians that in the use of the term "Restricted Lands," Congress always had in mind those lands which were "inalienable" by the Indian until "restrictions against alienation thereof were removed" by an order made by the Secretary of the Interior.

Further than this, it is our belief that the provisions of Sec. 9 of Act of May 27, 1908, which specified the manner in which the conveyances of lands inherited by full-blood Indian heirs should be made, to-wit, by the approval of the County Court of the State of Oklahoma having settlement of the estate of the deceased allottee, is merely a specification as to the mode, or manner and form in which conveyances of such lands by said citizens who are full-blood Indian heirs, should be executed. The Legislature of the State of Oklahoma and of many other states in the Union prescribed in their statutes the manner and the form in which deeds of conveyances to homesteads

of their citizens may be executed. The Constitution of Oklahoma prescribes that a deed of conveyance to lands constituting the homestead of a family is absolutely void unless the deed of conveyance be executed jointly by both the husband and wife:

> "SEC. 2, ART. 12, OF CONSTITUTION. *Protected From Forced Sale—Consent of Wife.* The homestead of the family shall be, and is hereby protected from forced sale, for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such a manner as may be prescribed by law: *Provided*, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any mortgage."

See also:

Hyde v. *Ishmael*, 143 Pac. 1044;
Whelan v. *Adams*, 145 Pac. 1158;
McCammon v. *Jenkins*, 145 Pac. 1163.

This is not a restriction. It is clearly a specification as to how the deeds conveying the homesteads shall be executed.

It was done for the purpose of requiring both husband and wife to consent when their homestead is sold by requiring that they join in such conveyance.

It was done for the protection of the homes of the citizens in order that the sale of the homesteads of families of Oklahoma citizens may not be sold without the consent of both the husband and wife.

Sec. 9 of Act of May 27, 1908, prescribed a manner or mode by which conveyances of full-blood Indian heirs should be executed, to-wit, by the approval of the proper County Court.

Under the laws of the State of Texas, it is prescribed by the statute not only that deeds of conveyances of homesteads of its citizens must be executed jointly by both the husband and wife, but that their acknowledgments as to the execution of same, of both the husband and wife should be taken separately and in the absence of the husband and wife, one from the other.

It has been held by the courts of Texas that where acknowledgments of the execution of such deeds to said homesteads by the husband and wife were not executed separately in the manner prescribed, to-wit: the acknowledgment of the wife should be taken privately from the husband, that the conveyance of said homestead is void. It has been held by the courts that deeds to lands of full-blood Indian heirs are null and void unless executed in the prescribed manner, to-wit: with the approval of the County Court having jurisdiction, etc. A husband and wife, inhabitants of the State of Oklahoma, have

the right to sell their homesteads and so have the full-blood Indian heirs of the Five Civilized Tribes the right to sell the lands inherited by them. They are not restricted or prevented from alienating or selling same but a manner or mode in which said conveyances shall be executed is prescribed by law. That is to say that the homestead of the family shall be conveyed only when joined in by both the husband and the wife, under the terms of the statute of the state applicable thereto, and that deeds of conveyances to lands inherited by full-blood Indians of the Five Civilized Tribes shall be approved by the County Court, as prescribed by law.

The proviso requiring County Court approval of conveyances by full-blood Indians of their inherited allotted lands has no field for operation except merely to provide a procedure for alienation of such inherited lands or some interest therein. The oil and gas lease involved is a conveyance of an interest in the land within the meaning of said Act of Congress.

That part of section 9 which removes all restrictions means precisely what it says. The natural and literal meaning of the words "remove all restrictions" is clear. The words "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land" need no construction, and

therefore it must be held that the act itself defines the County Court approval provided for *as mere procedure*. While restrictions are on Indian land the owner has no power to negotiate and close a deal for the sale of the land. But upon removal of restrictions the Indian owner has the full power to close a deal for the conveyance of his land or any interest therein and make the same entirely effectual, subject only to the purely ministerial act of approval by the County Court having jurisdiction of the estate of the deceased. The term "restrictions" when applied to the alienation of land has a very broad meaning. The removal of all restrictions, therefore, was very comprehensive. The natural and literal meaning of a statute removing restrictions upon alienation should not be enlarged by implication, for, as was held in the *Mullen* case by this court, restrictions upon alienation are found in the *express* provisions of the statute. If County Court approval is to be considered a restriction upon alienation such restriction must be found in the statute—it is not there. On the contrary, the statute in effect declares that the County Court approval is not a restriction but a mere procedure in that it does expressly provide that the act removes all restrictions of every kind and character upon alienation of the land or any interest in the land.

Counsel for the appellants, on page 10 of his brief, says in effect that the class of lands here involved are "restricted" lands and that therefore an oil and gas lease executed now by an adult full-blood Creek Indian on land inherited by him would necessarily require the approval of the Secretary of the Interior, before such oil and gas lease would be valid, basing his statement upon that portion of section 2 of the Act of 1908, providing for the approval of the Secretary of the Interior of oil and gas leases on "restricted" lands. To our minds his entire argument falls here completely, if not for various other reasons argued by us, because it is an elementary and well established principle of statutory construction that in construing a statute, consideration must be given to the entire statute including all its parts, and not to consider only an isolated paragraph or section of the statute, in order to ascertain the intention of the makers of such legislation. It is now well settled by the decision by the state and federal courts, as well as by historical knowledge, that the purpose of Congress in enacting the Act of May 27, 1908, was to include therein, complete legislation as to the status of all of the allotted lands of the Five Civilized Tribes, and the Act of 1908 embraces within itself, the complete law as to what lands of the Five Civilized Tribes of Indians, since that date are "restricted" and inalienable, and as to

what lands of the Five Civilized Tribes of Indians are "unrestricted" and alienable, and by an examination of the entire act in itself, as well as an examination of all the prior Acts of Congress dating back with the Original Creek Treaty, it will be observed that in the use of the term "restricted" lands, Congress has always had in mind only the classes of allotted lands which were inalienable and which the Indian could not sell except without first securing "the removal of restrictions" therefrom, by the Secretary of the Interior.

Not only is it plain that that part of section 2, requiring the approval of the Secretary of the Interior on oil and gas mining leases covering "restricted" lands embraces only those lands, which under the terms of the act itself, continued to be inalienable except with the removal of restrictions from the lands by the Secretary of the Interior, but the attempt to place any other construction thereon would upset the entire scheme of Congress, which it had in mind in its passage of this act, and would overthrow the title upon thousands and thousands of acres of land in the Eastern portion of the State of Oklahoma.

To uphold a contention that "restricted" lands, as referred to in section 2 of the act includes oil and gas leases on lands inherited by adult full-blood Creek Indians because their conveyances thereof

must be approved by the County Court of Oklahoma, under the first proviso of section 9, would be to say that an oil and gas mining lease on lands owned by Indian minors of less than one-half Indian blood (because conveyances of lands owned by such minors are void when made during minority unless the conveyance is approved and confirmed by the proper County Court after the proper guardian sale thereof, see *Truskett* v. *Closser*, 236 U. S. 223), would also necessarily require the approval of the Secretary of the Interior under the term of said section 2, and we do not anticipate for a moment that any one would attempt to make the assertion that such is the law.

Again, in the middle of page 12, of the brief of counsel for appellants, appears the statement, as follows:

> "In other words, whether the present appellee, Eastman Richard, is an incompetent or not because he is a full-blood Indian, it is certain that if he were a minor the probate court would have no power to approve an oil and gas lease of his inherited land."

And this statement we wish particularly to call to the attention of the court and to say in no uncertain language, that the same is an incorrect and erroneous statement of the law. See:

Harris v. *Bell*, 250 Fed. 209, and
Etchen v. *Chaney*, 235 Fed. 104.

The oil and gas lease is a method of alienation within the meaning of said section 9.

—*Hoyt* v. *Fixico,* (Okla.) 175 Pac. 517;

Moore v. *Sawyer,* 167 Fed. 826;

Eldred v. *Okmulgee Loan & Trust Company,* 22 Okla. 742, 98 Pac. 929;

Parker v. *Riley,* 243 Fed. 42;

Guffey v. *Smith,* 237 U. S. 101, 59 L. ed. 856;

Rich v. *Doneghey,* (Okla.) 177 Pac. 86.

In *Hoyt* v. *Fixico, supra,* the Supreme Court of Oklahoma held:

> "An oil and gas mining lease executed February 11, 1915, by a full-blood heir of a deceased Creek Indian allottee, is a 'conveyance of an interest' in said lands, and is void unless approved as required by section 9, Act Cong. May 27, 1908, c. 199, 35 Stat. 315."

In *Rich* v. *Doneghey, supra,* the Supreme Court of Oklahoma, construing a lease similar to the one here involved, held:

> "The grant of oil and gas underlying the grantor's land to one and his heirs and assigns forever, carries an interest in the fee."

Upon the same point it was also said:

> "It will at once be seen that by this instrument the plaintiffs granted to the defendant the present vested interest in their land."

Discussing the Illinois cases construing oil and gas mining leases, where it had been held that the oil lease conveyed an interest in the realty, the Supreme Court of Oklahoma, in the *Rich* case, said:

> "Moreover, there is no substantial difference between the earlier holdings of this court and of the Illinois court as to the character of the interest acquired by the lessee under the instrument here under consideration. * * * Therefore the only difference between the decisions of the Illinois court and this court as to the right acquired by the lessee under an oil and gas lease for a definite term, and as long thereafter as oil and gas is produced, 'a freehold interest in land,' while we have designated it *'an interest in land'* without saying whether such interest amounts to a freehold, and in the two states such interests are taxed by different methods, which results not from a difference in conception of the character of the interest, but from the applicable statutes pertaining to taxation thereof."

The case of *Guffey* v. *Smith*, 237 U. S. 101, 59 L. ed. 856, is squarely in point upon the proposition that such an oil and gas mining lease conveys an interest in the realty. The early Oklahoma cases defined an oil and gas mining lease as a mere license or option which conveyed no interest in the real estate, but after the decision of this court in *Guffey* v. *Smith*, *supra*, it soon became apparent that the Oklahoma cases were not in line with au-

thority and that they were not sound upon principle and the later cases have brought Oklahoma in line with other jurisdictions and with the decisions of the Supreme Court of the United States, and it is now settled in Oklahoma that this oil and gas mining lease conveys an interest in the land. It follows therefore, that all oil and gas mining leases covering all classes of inherited Indian lands of both adult and minor heirs (except only that class of homesteads specifically provided for in the second proviso of section 9, to-wit: homesteads of allottees of one-half or more Indian blood, who died leaving issue born since March 4, 1906, which homesteads remained *inalienable,* for the use and support of such issue until April 26, 1931) have been withdrawn entirely from the jurisdiction of the Secretary of the Interior and require only the approval of the proper County Court of the State of Oklahoma, as specifically provided for in the first proviso of section 9. It is contended in the brief for appellants that in the case of full-blood minor heirs the Secretary still has the authority to approve oil and gas leases on this class of inherited lands, executed upon their behalf, but this contention is unsound. *Harris* v. *Bell,* 250 Fed. 208, by the Circuit Court of Appeals for the Eighth Circuit, holds, following cases there cited, that the County Court approval only is sufficient to validate a lease made upon the behalf of a full-

blood Indian minor (except as to that particular class of homesteads inherited by those minor heirs born since March 4, 1906, and which class of inherited homesteads are absolutely inalienable and specifically provided for in the second proviso of said section 9, of Act of 1908 for benefit of those minors born after the Act of 1906, and too late to receive any individual allotment). To the same effect is *Etchen* v. *Cheney*, 235 Fed. 104. Said section 9, therefore, provides that the full-blood Indian heirs themselves and the County Courts, in proper cases, shall have complete power and jurisdiction over all oil and gas mining leasehold interests to convey the same in any manner deemed proper by them. The right in the full-blood Indian heir to convey the leasehold interest on inherited lands freed from any supervision of the Secretary of the Interior, carries with it necessarily the right to receive and manage the funds accruing from said leasehold interest. *The Act of May 27, 1908, as has often been held provided a complete, comprehensive and new scheme, classifying all Indians of the same degree of blood alike, thereby doing away with the confusion theretofore incident to various acts affecting different members of the tribes in different ways. But this act cannot be said to be a complete and comprehensive scheme if there is left in the Secretary of the Interior the right to manage the royalties com-*

ing from inherited lands and leaving to the Indian himself, with the approval of the County Court, the right to convey the leasehold interest. It will not be denied that Eastman Richard has the right to cancel the existing lease, with the consent of the lessee and, with the approval of the County Court, to make a new lease providing that the accruing royalties shall be paid direct to him. *It is manifest that the power to do the larger and more important thing, namely to convey the land itself, carries with it the lessor's right to receive the profits from the leasehold.* Any other construction would be absurd and would destroy the symmetry and completeness and uniformity of the scheme provided by the Act of May 27, 1908.

Counsel for appellants on pages 9 and 10 of his brief, cites the cases of: *Tiger* v. *West. Investment Co.*, 221 U. S. 296; *Brader* v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104; and *Marcy* v. *Board of Commissioners*, 45 Okla. 1, 144 Pac. 611; but these cases are not controlling decisions on the question involved in this case because they do not cover the point of law that is here involved, nor was the question, which is here involved, directly presented to the court in either of the cases mentioned. The question presented to the court in the *Tiger* case was

> "Whether or not deeds executed by full-blood Indian heirs after the passage of the Act of

> April 26, 1906, and prior to the Act of May 27, 1908, and which were not approved by the Secretary of the Interior, are valid or void deeds."

The court held in the *Tiger* case that the deeds were void, because they were not approved by the Secretary of the Interior.

The question presented to the court in the *Brader* v. *James* case was,

> "Could a full-blood Choctaw Indian, after the passage of the Act of April 26, 1906, and prior to the passage of the Act of May 27, 1908, convey the land inherited from a full-blood Choctaw Indian, to whom the lands had been allotted during her lifetime without the approval of the Secretary of the Interior."

It will be remembered that in that case the court held that the deeds executed by the full-blood Indian heir, after the passage of the Act of April 26, 1906, and prior to the passage of the Act of 1908 was not valid, unless approved by the Secretary of the Interior, in the manner provided by Congress, and the question involved in this case as to whether or not the Secretary of the Interior has the right to control and supervise oil leases on land inherited by full-blood Indian heirs, after the death of the allottee, was not in any manner involved in that case. Even in the case of *Brader* v. *James*, the court refers to the *Tiger* case, and uses the following language:

> "The act of April 26, 1906, was a comprehensive one, and intended to apply alike to all of the Five Civilized Tribes, and made *requirements* as to the conveyance by full-blood Indian heirs, *which should take the place of former restrictions and limitations.* The purpose was to substitute a new and uniform scheme controling alienation in such cases operating alike as to all of the Five Civilized Tribes."

Nor in the case of *Talley* v. *Burgess, supra*, was the question involved in this case raised or submitted.

The issue presented in this case is whether or not *the Department of the Interior has the power to continue to supervise a conveyance of the land in question after the death of Samuel Richard*, and *whether or not the Department of the Interior has the right to continue to collect the rents and profits daily accruing from the lease on this land since the death of Samuel Richard.*

It is our contention as stated before, that *after the death of Samuel Richard, all supervision, so far as the Department of the Interior is concerned, immediately ceased.* That *under the terms of Act of 1908, if this land is subject to supervision at all, the supervision is given to the County Court of Oklahoma, and not to the Secretary of the Interior.* In the *Marcey* case, *supra*, the question here involved was

not directly presented to the court. The point presented and decided in that case was whether or not lands inherited by full-blood Indians were taxable or non-taxable, and the courts properly in that case, held that the lands were non-taxable. This is a proper decision and clearly carried out the intent of Congress that the lands inherited by full-blood Indians should not be subject to taxation or subject to an *involuntary* sale or conveyance.

Congress in providing in the 1908 act for removal of restrictions against alienation by the heirs upon the death of the allottee, contemplated giving the full-blood Indian heir the right to make a *voluntary* alienation, but did not intend that his lands could be alienated from the heir *involuntarily,* such as by taking same upon execution, or for delinquent taxes, etc., and, therefore, provided that his alienation should be approved by the County Court.

As stated in the case of *In re French's Estate,* 147 Pac. 319, in speaking of removal of all restrictions the court says:

> "Section 1 of the Act of April 21, 1904 (33 Stat. at L. 189, c. 1402), providing that '* * * all restrictions upon alienation' of 'lands' 'of all * * * allottees' of either of the Five Civilized Tribes of Indians who are not of Indian blood, 'except minors,' are 'except as to homestead,' hereby 'removed * * *' should be construed to

> authorize *voluntary* alienations only as distinguished from *involuntary* or enforced encumbrances, sales, or takings, such as are referred to in the first part of section 14 of the above act."

The court in the *Marcey* case, *supra,* decided that the proviso was a restriction against an *involuntary* alienation. The question as to whether or not the land is "restricted" against a *voluntary* alienation was not directly presented to the court in that case and, therefore, that case is not controlling as to the issue raised here.

It was intended by Congress by Sec. 9 of Act of May 27, 1908, in removing restrictions against alienation on allotted lands, upon the death of the allottee, to protect the full-blood Indian heirs, by providing that their lands should not be subject to involuntary alienation either by taxation or sold to satisfy any debt contracted *prior* to the removal of restrictions, when it specified that the deeds of conveyances by such full-blood Indian heirs should be approved by the County Courts designated. This for the purpose of protecting the Indian in seeing that when he sold his land he would receive an adequate consideration therefor. As said in the opinion in the case of *Hope* v. *Foley*, 157 Pac. 727:

> "The title to inherited lands was in the heir, and the heir had the right to convey upon approval of the approving agency * * * The object

of requiring the approval was to place the incompetent Indian on an equal footing with the person dealing with him, presumably competent, and the purpose of the approval was to require a disinterested agency to examine into the transaction and ascertain whether or not the Indian grantor had been overreached in the trade. If the investigation convinced the approving agency that the full value of the land had been paid and received by the grantor in the deed, whether paid on the date of the execution of the conveyance or when presented for approval, or paid at some prior time, could make no difference. That particular thing was that the full value of the land had been paid to the Indian."

If it be admitted, for the sake of argument, that the United States Indian Agent still had the authority, to-wit, to hold from the heirs moneys collected by him prior to the death of Samuel Richard, because of the adopted amendment to Rule 25, *supra* (all of this we deny, however), yet there is no authority granted to the United States Indian Agent to continue to collect the moneys derived from the sale of oil extracted since the death of Samuel Richard, and which are now accumulating from the sale of oil which has been extracted and is being extracted from this land since the death of Samuel Richard, *because all further supervision over this lease so far as the Secretary of the Interior or the United States Indian Agent is concerned ceased after the death of Samuel Richard.*

The supervision of conveyance of this land according to the terms of Sec. 9 of Act of 1908, is given to the County Court.

Eastman Richard can sell this inherited land without approval, sanction or supervision of the Secretary of the Interior, or the Indian Agency. If he sees fit not to sell this land, cannot he collect the rents and royalties daily accumulating from the sale of oil extracted from this land?

To admit that Eastman can sell the fee simple title to this inherited land, and collect the purchase price therefor without any supervision of the Secretary of the Interior, and at the same time to contend that if Eastman Richard does not sell this land that Eastman Richard cannot collect the rents and profits derived from same, is inconsistent. Such a holding in effect would be to say to Eastman Richard:

> "Eastman Richard you can sell this land inherited by you from Samuel Richard, with the approval of the County Court of McIntosh County, Oklahoma, and you can also collect the purchase price for which you agree to sell it even though it be a half million dollars and the Secretary of the Interior cannot prevent you from selling this land, nor can the Secretary of the Interior or Indian Agent collect the money you get from the sale of the land,"
>
> BUT
>
> "If you do not sell this land you cannot col-

lect the rents and profits daily accruing therefrom, but the Secretary of the Interior or his subordinates, the United States Indian Agent, can collect same and hold it as long as he sees fit."

If it be held by the courts that the Indian Agent can withhold this money collected *prior* to the death of Samuel Richard, and also can continue to collect the royalties from this land, *since the death of Samuel Richard, then Eastman Richard will be compelled to sell this inherited land and collect this money for which he agrees to sell it, in order to get in his possession money from this land.* It does not seem to us that the courts will hold that such is the law. Eastman Richard can sell this land without the sanction or supervision of the Secretary of the Interior, and in fact he has been besieged by numbers of oil companies since the death of Samuel Richard endeavoring to induce him to sell this valuable tract of oil land. He has been offered as much as $500,000.00 for same, but in as much as Eastman already has sufficient unrestricted moneys from other sources, he does not desire to sell this valuable oil property. He no doubt realizes if the oil companies can buy this land and make a profit from the sale of royalty oil extracted therefrom that it is good business policy to hold the land and collect the royalties himself. No doubt Eastman Richard feels that if he has the legal

right to sell this land and collect the value of same in money without supervision of the Indian Department, he no doubt feels that he has the legal right to collect the royalties and moneys derived from the sale of oil daily extracted from the sale of land without supervision of the Department of the Interior.

The Supreme Court of Oklahoma in the case of *Hope* v. *Foley, supra,* holds that the land inherited by the full-blood Indian heir is not "restricted" land, because the heir can alienate the same: All that is necessary is that after the heir and the purchaser (the grantee and grantor) make their contract of sale, that the County Court approve the transaction. This provision no doubt was made by Congress because it realized that all restrictions were removed by Sec. 9 of Act of 1908, and it was deemed wise to provide the conveyance when made by the heir be approved by the County Court in order to avoid improvident sales. The object of requiring the approval by the County Court was to place the Indian on an equal footing with the person dealing with him, so that the County Court might see that the grantor was not overreached in the transaction.

In the case of *Sampson* v. *Staples,* the Supreme Court of Oklahoma, says:

> "This act (Act of 1908) does not reimpose restrictions *(United States* v. *Bartlett et al.,* 235 U. S. 72, 35 Sup. Ct. 14, 59 L. ed. 137); but it does

require the conveyance of inherited lands by full-blood Indian heirs to be approved by the County Court."

From an examination of the opinion rendered by the United States Circuit Court of Appeals in this case (Rec., p. 43; 245 Fed. 330) it will be observed that the court gave this question thorough consideration and examined the records and Congressional reports of the different branches of Congress in connection with the passage of the Act of May 27, 1908, in order to ascertain what at that time was the true object sought by Congress in passing that legislation, and it was ascertained from the reports of the two houses that the object of the act passed by Congress in 1908 was to release about 8,000,000 acres of land or one-half of the restricted allotments from further supervision by the United States over its alienation, and we certainly think that the court correctly interpreted the law and that it was correct when it announced in its opinion that it believed that "Congress did not intend, in allowing the heirs of allottees to alienate their land free from all restrictions subject only to the approval of the proper probate court, to leave the heir in the same position as the intestate was before his death. The legislation meant something. Neither did Congress intend to postpone the enjoyment of the estate of the heir until after he had sold it with the

approval of the probate court, which would be the only way he could remove the only restriction left."

Expediency.

The appellants have invoked expediency. If expediency is to be considered the appellants must lose to Eastman Richard. Let us assume for a moment that Eastman Richard is competent to manage his affairs. If he is competent then surely he ought to have his money. Let us suppose, on the other hand, that he is not of unsound mind but that he has no business skill and that he might be cheated out of his estate. If that is true, in what situation would he be if this fund is delivered up? The Supreme Court of Oklahoma has answered this question, construing the Oklahoma statutes most favorably for the protection of the Indians. In *Shelby* v. *Farve*, (Okla.) 126 Pac. 764, it was held that whenever it appears to a County Court *that for any cause whatever an Indian is unable, unassisted, to properly manage and care for himself or his property, or that he would be likely to be deceived or imposed upon by artful or designing persons, that he should have a guardian to care for him and for his estate.* In the *Shelby* case, construing the Oklahoma statute providing for the appointment of a guardian for incapable persons, the court in defining the words "incompetent" and "incapable," said:

> "The phrases 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in article 15, c. 86, sections 5485, 5486, Comp. Laws 1909, mean any person who though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable unassisted to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

If, therefore, Eastman Richard is a person who, for any cause, is unable, unassisted, to properly manage and care for his estate, if, for any reason, he is the sort of person likely to be deceived or imposed upon by artful or designing persons, the County Court of the county in which he resides will appoint a guardian to take care of his estate. If he is that sort of an Indian the court will see to it that the moneys in the hands of the Indian Superintendent and the cashier of his office are not received by Eastman Richard in person but that they be taken by a guardian. However, it would seem from the record in this case since Eastman Richard was the guardian of his child he is the sort of person who is capable of managing his estate.

In addition to the supervisory control of the County Courts over incompetent Indians, there are many other safeguards. Every court has in attendance from time to time a United States probate at-

torney, provided for by the Act of May 27, 1908, whose duty it is to aid and assist Indians. These probate attorneys have the right to appear for all Indians of Eastman Richard's class. They have a right to appeal on behalf of the Indians, as has been held by the Supreme Court of Oklahoma. Any probate attorney in actual attendance in a County Court of Oklahoma dissatisfied with an order or decree may appeal within ten days, and it has been the practice to appeal without bond from every order which the probate attorney deemed against the interest of an Indian. If not in actual attendance such probate attorney has thirty days after the order is entered to appeal. Take the case of an incompetent Indian: If an unsatisfactory order is made in the County Court the probate attorney may appeal to the District Court, which is a court of general jurisdiction, where there is a trial *de novo*. If dissatisfied with the decree of the District Court he may appeal to the Supreme Court of the state. In every matter involving an Indian question the courts of Oklahoma have been sound in this: they have shown a disposition in every case of doubt to put that construction upon the statute which is most beneficial to the Indians. Then there are field clerks to report to the Indian office and to advise probate attorneys, and government farmers to look after the Indians and report whether they are doing well

The Indian Superintendent for the Five Civilized Tribes resides at Muskogee, about in the center of what was formerly the Indian country. He has a large office force which he can use in advising and assisting the Indians and in helping the courts of the country. What this situation needs is that the Indian office respect the courts instead of overruling and ignoring them. This office should aid and advise the courts rather than to usurp the authority of the courts and in so doing the intention of Congress would be given full force and effect. It is hardly necessary to state that as the situation now exists that beautiful thing called "comity" hardly exists between the Department of the Interior and some of the courts, because the courts can not tolerate the disregard of their lawful orders.

II.

Repeating our Second Proposition:

The amendment to Rule 25 promulgated November 29, 1912, after the execution of the lease, was and is unenforceable as against the lessor and his heirs, because the amended rule attempts to change the terms of the lease contract.

The defendants base their sole and only claim or right to hold the funds in controversy, upon the alleged authority contained in the amendment to Rule 25, adopted Nov. 29, 1912, (Page 28 of Rules and Regulations). The lease in question was executed April 13, 1912, and the lessor executed the same under the rules and regulations of the Secretary of the Interior then in force, as to the terms and manner of payment of the royalty money, which was as follows:

> "*25.* All royalties, rents or payments accruing under any lease made for or in behalf of any minor or incompetent shall be deposited by the Indian Agent or other Government officer to whom paid, to the credit of the guardian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian Agent in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper

court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior, guaranteeing the same care and custody of the funds so deposited." (Page 12 of Regulations.)

It will be observed that under the rules and regulations which were in force at the time of the execution of the lease, that the royalties and payments accruing under the lease should be collected by the Indian Agent for the minor and deposited to the credit of the guardian of the minor in a bank and could by him be withdrawn from the bank in sums not exceeding $50 per month and could be withdrawn from the bank in sums in excess of $50 per month by order of the Probate Court. It was with the understanding that the lessor would receive payments of the royalty money accruing under the lease in this manner when he executed the lease in question. In paragraph 8 of lease it is provided as follows:

"8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; *Provided*, however, that *no regulations made after the approval of this lease, affecting* either the length of term of oil and gas leases the rates of royalty or *payment thereunder*, or the assignment of leases, *shall operate to affect the terms and conditions of this lease.*" (Rec. p. 15.)

Thus it will be seen that when the Secretary of the Interior promulgated the Amendment to Rule 25, on Nov. 29, 1912, five months after the lease was executed, which amended rule reads as follows:

> "*Provided However*, that the said superintendent, or other officer in charge of the Union Agency, is authorized in his discretion, where considered for the best interests of any adult, minor or incompetent lessor, or his heirs for whose account royalties, rents or payments accruing under any lease have been paid to said superintendent to withhold the disbursement of such royalties, rents or payments, wholly or in part from any such adult, or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of the said lessor, of his or her heirs." (Page 38 of Regulations.)

That he changed the terms of the payment of royalty money to the lessor from the terms of the the manner of payment thereof which were in force at the time the lease was executed and that in so doing, he attempted to give himself and his subordinates the power to withhold such amounts as he deemed proper on the royalty payments accruing from the lease. This new rule and regulation concerning terms of payment, it will be seen was made 5 months after the execution of the lease and was made without the consent or knowledge of the lessor and therefore was

such a change in the terms of the lease contract as would not be binding upon the maker of the lease contract, especially in view of the expressed conditions in the contract to the effect as is contained in the proviso in paragraph 8 of the lease above quoted.

In this connection we invite the court's attention to the case of *Midland Oil Company, et al.*, v. *Turner, et al.*, 179 Fed. 74.

Indeed, at the time of the execution of the lease, the lessor would not have executed the same under the provisions that all the payments accruing therefrom could be collected by the Indian Agent and by him withheld for an unlimited time, but the lessor executed the lease with the understanding that he could collect the rentals and payments through his guardian from the bank in which they were deposited, under the orders and jurisdiction of the Probate Court. For this reason, if for no other, we say that the rule and regulation made Nov. 29, 1912, five months after the execution of the lease, changed the terms of the contract as to the terms of payment and therefore is void.

III.

Repeating our Third Proposition:

Upon the death of Samuel Richard on January 24, 1916, all governmental supervision over the lease on his allotment of land ceased, even though, as a matter of law, all restrictions as to alienation are not removed.

Even though it be held by the court that because a deed by the heir of Samuel Richard requires approval by the County Court that this constitutes a "restriction" in the sense it was meant to be used by Congress, yet ALL *GOVERNMENTAL SUPERVISION* OVER THE LEASE ON THIS LAND CEASED IMMEDIATELY UPON THE DEATH OF THE ALLOTTEE, Samuel Richard. *Likewise all governmental supervision over a sale of the entire fee in the land by the heir of Samuel Richard immediately ceased upon the allottee's death. All supervision of the Secretary of the Interior over the lease on this land ceased upon the death of the allottee, Samuel Richard. The right that the Secretary of the Interior had during the allottee's lifetime to remove restrictions against alienation of the land, or to approve a lease on the land, or to supervise or approve a sale of the land, or to supervise and collect the proceeds of sale of oil extracted*

from the land, all immediately ceased upon the death of the allottee, Samuel Richard. We take it, since the death of Samuel Richard, that no one will attempt to contend that the Secretary of the Interior has the right to either remove restrictions from the land, or to supervise or approve a sale or conveyance of the land, or to supervise or approve a lease on the land, or the power to supervise and collect the proceeds of sale of oil extracted from the land, where a lease is executed by the full-blood heir. Therefore, why has he any power to continue to exercise supervision over the lease on this land, and to continue to collect the proceeds of sale of oil extracted from the land, since the death of the allottee, Samuel Richard?

It was the intention of Congress by the Act of May 27th, 1908, to provide that upon the allottee's death, all further supervision over the land by the Secretary of the Interior would cease and that thereafter the land would be free of all further restrictions or supervision, save and except that a conveyance of same should be approved by the County Court.

It has been repeatedly held by the courts that Sec. 9 of the Act of May 27th, 1908, reading as follows:

"That the death of any allottee of the Five

Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section,"

operated to rescind the authority and power given to the Secretary of the Interior by section 22 of the

Act of 1906, to supervise conveyance of lands inherited by full-blood Indians.

—*Hope* v. *Foley,* (Okla.) 157 Pac. 727;
United States v. *Knight,* 206 Fed. 145;
MaHarry v. *Eatman,* (Okla.) 116 Pac. 935;
Sampson v. *Staples,* (Okla.) 155 Pac. 213.

Prior to the passage of the 1908 act, all conveyances of full-blood Indian heirs had to be approved by the Secretary of the Interior, under the provisions of section 22 of the act approved April 26, 1906 (30 Stat. L. 137), but after the passage of the Act of May 27, 1908, neither the Secretary of the Interior nor any official of the Department of the Interior had the right to exercise any control or authority over this class of conveyances.

The rules and regulations of the Secretary of the Interior relative to oil and gas leases made no provision for the leasing of this class of lands, thus clearly indicating that the Secretary of the Interior did not consider the same restricted.

By an Enabling Act approved June 16, 1906 (34 Stat. L. 267), the inhabitants of Oklahoma and Indian Territories were granted the right to establish a state, which was done November 16, 1907.

Prior to this time it had been the policy of Congress, as shown by its legislation, to withdraw federal supervision over citizens of the Five Civilized

Tribes as soon as they were found able to maintain themselves and to let them become full-fledged citizens of the new commonwealth. (It might be well to call attention here to the fact that the Indians of the Five Civilized Tribes possessed a far greater degree of intelligence and of civilization than any other Indian Tribe in these United States, and hence were called the "Five Civilized Tribes" of Indians, and it was no doubt for these reasons that Congress so rapidly, in its series of legislation, released the greater portion of these Indian allottees from federal supervision.)

First Congress created the Dawes Commission; then abolished the Tribal Government; then made these Indians citizens of the United States and then by a series of acts removed their restrictions—*first*, by the Act of 1904, from those allottees not of Indian blood, and *second*, after statehood, by Act of May 27, 1908, from the mixed-blood Indian allottees and from the full-blood Indian heirs, so that they might help bear the burden of self government, as well as enjoy the blessings thereof.

It was the wise policy of Congress to relinquish its control step by step and to throw same upon the local government gradually, so that the Indian citizens would become accustomed to dealing with the new government gradually; and it was also the policy to bring the Indian in touch with the new gov-

ernment at as many points as possible. For this two-fold reason, Congress provided that conveyances should be approved by the courts with whom the Indian must come in contact in most all of his affairs. Each full-blood allottee has his own allotment, restricted and non-taxable. His wife and each child born prior to the closing of the rolls has an allotment. Many of them were heirs to one or more allotments from deceased kin. They were land poor.

Congress was willing for them to dispose of their inherited lands, but as a safeguard charged the County Courts of Oklahoma with the duty of approving such conveyance so that the heirs might not be overreached. Neither the Secretary of the Interior nor any other government officer could prevent the approval of conveyances on such class of lands. The Secretary of the Interior can not prevent the Indian heir from conveying or selling his inherited lands; nor can he prevent a County Court of Oklahoma from approving the conveyance of the Indian heir; Congress in releasing this class of lands in the hands of the Indian heirs from the federal supervision that existed prior to the Act of 1908, merely prescribed the mode and manner by which such conveyances should be executed.

In order to throw light on the reasons for the adoption of this rule it may be proper to examine into the history of the adoption of the amendment

and ascertain what was the intention of the Secretary of the Interior at the time same was adopted.

It was not the intention of the Secretary of the Interior by the adoption of Rule 25 to attempt to retain supervision over leases of this class of lands; it was adopted only for the purpose of retaining supervision over the class of lands which continued to be subject to federal control and supervision, under Act of May 27, 1908.

Under the provisions of the Act of May 27, 1908, *supra*, there is a class of inherited lands still subject to the governmental supervision even after the death of the allottee, but it does not include lands inherited by adult full-blood Indian heirs. Section 9 of the act reads as follows:

> "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided, Further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March 4th, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed*

therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one: But if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restriction. If this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nine hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from *all restrictions.*"

From this statute it will be observed that where the allottee died, his lands, both surplus and homestead, descend to the adult full-blood heirs, free of restrictions, except that the full-blood heirs' conveyance must be approved by the County Court, but where the allottee was enrolled as a half or more degree of Indian blood, and left surviving him a child, or children, born since March 4, 1906, that his homestead 40 acres, continued *inalienable* until April 26, 1931, unless the child or children died prior to April 26, 1931, or unless the Secretary of the Interior removed the restrictions against alienation. There is a clear distinction between these two classes of lands; the first being a class where upon the allottee's death the lands became free of restrictions, and the supervision of the Secretary of the Interior over same was rescinded or cancelled and the au-

thority to approve the heir's conveyance placed upon the County Court; in the second class, the lands (homestead 40 acres) continued to be restricted and INALIENABLE until April 26, 1931, etc., and such homesteads continued even after the death of the allottee to be subject to the supervision of the Secretary of the Interior. *It was this latter class of heirs that the amendment to Rule 25 was adopted to cover.*

This statute abrogates, cancels and rescinds all supervision of the Secretary of the Interior from lands inherited by full-blood Indian heirs who were adults. As to homesteads of certain allottees, to-wit: those allottees of one-half or more of Indian blood and who left children born since March 4th, 1906 (the date the rolls were closed), the homesteads continued to be inalienable until April 26, 1931. We contend that the Amended Regulations adopted on November 29, 1912, after the passage of this act, reading as follows:

> "*Provided, however,* that the said superintendent, or other officer in charge of the Union Agency, is authorized in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents or payments, accruing under any lease have been paid to said superintendent, to withhold disbursement of such royalties, rents or payments, whol-

> ly or in part for such adult, or guardian or curator of any minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs,"

applies to restricted Indian lessors during their lifetime, and ONLY to the heirs born since March 4, 1906, as above referred to. It was never intended to apply to ADULT FULL-BLOOD HEIRS, WHO MAY ALIENATE THEIR INHERITED LANDS WITHOUT APPROVAL OF THE SECRETARY OF THE INTERIOR, BECAUSE THE SECRETARY OF THE INTERIOR HAS NO AUTHORITY OR SUPERVISION OVER THE LAND, AFTER THE DEATH OF THE ALLOTTEE, EVEN WHERE THE INDIAN HEIR IS A FULL-BLOOD, IF *AN ADULT*.

Furthermore, the Secretary of the Interior has no legal power to make rules affecting lands of the unrestricted heirs; or the lands of heirs, who are freed from the supervision of the Secretary of the Interior, and the regulation in question does not give the superintendent or cashier of the Five Civilized Tribes, as agents, any legal right or authority to withhold payment of royalties accruing under the lease to the administrators of the estate of Samuel Richard for the beneht of the heirs.

It was not the intention of the Secretary of the Interior, when this rule was adopted, that the same should apply to lands or moneys accrued from lands, after the allottee died, where the heirs had the right to alienate their lands without supervision or control of the Secretary of the Interior. It was the intention at that time that the rules should apply to leases on lands which continued, after the allottee's death, to be subject to supervision of the Secretary of the Interior under the terms of the Acts of Congress, which are leases on those lands constituting the homestead (of allottees of one-half or more Indian blood who died leaving issue born since March 4th, 1906), which upon the death of the allottee continued to be inalienable and continued subject to the jurisdiction and supervision and control of the Secretary of the Interior until 1931.

The reason for continuing federal restrictions against this class of homestead lands, and making same *inalienable* until 1931 is clear. By an examination of the Acts of Congress it will be observed that it was the intention of Congress to reserve for all the Creek Indians, at least for a certain period of time, at least a portion of the lands of the Creek Nation. By early legislation allotments were given to the Creek allottees who were enrolled under the original treaties. Later, those Creek citizens who were born after May 1, 1901, and prior to March 4,

1906, were given the right to be enrolled under the provisions of the Act of April 26, 1906, *supra*. Those Indian children born after March 4, 1906 (after the rolls were closed), of course received no allotment of land. It was desired by Congress that some provision be made for those Creek Indian children who were born after March 4, 1906, who had no allotment, so in the next act which was passed by Congress on this subject, to-wit: Act of May 27, 1908, Congress provided in section 9, *supra*, that where allottees died, who were enrolled as one-half or more of Indian blood, and who had children born after the rolls were closed (that is, March 4, 1906), that the homestead lands should remain inalienable and be for the use and support of such children so born after March 4, 1906, during their life or lives until April 26, 1931, unless the Secretary of the Interior should remove the restrictions against alienation of same as provided for in section one of the act.

Therefore, inasmuch as under the provisions of the Act of May 27, 1908, the homesteads of certain allottees continued to be restricted and subject to the jurisdiction of the Secretary of the Interior, even after the death of the allottee, it was necessary to adopt an amendment to Rule 25 providing for the withholding of the funds of these heirs, as well as the funds of the living restricted Indians.

Departmental construction of section 9 of the Act of May 27, 1908, and of the regulations respecting oil and gas leases. Reason for the insertion of the word "heirs" in the regulations.

For years after the Act of May 27, 1908, the departments of the government construed section 9 of the Act of May 27, 1908, as removing all restrictions from the lands of deceased allottees excepting only the homesteads of deceased allottees reserved for the use of minors under provisions of the Act of May 27, 1908. The appellants put much stress upon the words "or his or her heirs" in the regulations authorizing the Indian Superintendent to hold the royalties from the lands of deceased allottees. This provision as to heirs was inserted in the amendment solely for the purpose of covering royalties accruing from homesteads of deceased allottees reserved for minors. At the very time of this amendment in which the word "heirs" was inserted, the department was relinquishing jurisdiction of all lands and royalties of the character here involved. Since writing the foregoing parts of this brief we have just discovered the true history of this amendment, which appears in the following letter from Mr. R. S. Cate, for many years a law clerk at the Union Agency, Muskogee, and acting United States Indian Agent in the absence of the then Indian Agent, Dana H. Kelsey, and in-

cidentally the same person who sent the lease on the lands in question to the Indian Commissioner for approval as shown on page 17 of the record in case 313:

"Messrs. Lucas & Tabor,
Attorneys at Law,
Checotah, Oklahoma.

Gentlemen: Replying to the inquiry of your Mr. Tabor as to the history of the amendment of November 29, 1912, to the oil and gas leasing regulations promulgated by the Secretary of the Interior, particularly with reference to the words 'or his or her heirs' in said amendment, I beg to advise that when the Act of May 27, 1908, was passed and for seven years thereafter, I was employed in the office of the Superintendent of the Indian Agency at Muskogee, Oklahoma, and acted as a law clerk, and in the absence of the Superintendent performed the duties of Acting Superintendent. The words in said amendment 'or his or her heirs' were inserted at my suggestion in the draft of the proposed amendment to the regulations to cover that class of cases arising under the provisions of the Act of May 27, 1908, which provides:

'That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the

> Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931,'

the construction of which act is now involved, I understand, in the case of *Parker* v. *Riley* pending in the Supreme Court of the United States.

Commencing about six months after the Act of May 27, 1908, at which time the Union Agency received advice from the department at Washington, the Union Agency relinquished jurisdiction of all leases, lands and moneys of deceased allottees except in the limited class of cases above referred to, that is to say, except in cases of homesteads reserved for minor children born subsequent to March 4, 1906. This relinquishment was made upon proof of death and upon examination of abstracts or other evidence showing the facts. During the three or four years subsequent to the passage of the Act of May 27, 1908, over a thousand cases were so relinquished.

Yours very truly,

R. S. CATE."

The foregoing letter of Mr. Cate states well known historical facts, and we have quoted same here in the belief that it may be of interest to this court.

It will further be observed by noting Rule 20 on page 27 of the Printed Rules and Regulations of

the Secretary of the Interior, reprinted on June 1, 1916, that these rules and regulations adopted by the Secretary of the Interior do not apply to lands owned by adult full-blood Indian heirs, after the death of the allottee. Section 20 reads as follows:

> "The classes of restricted lands to which the above quoted provisions of law and these regulations apply, are as follows:
>
> "*(1)* Homesteads of adult mixed-blood allottees having half or more than half and less than three-quarters of Indian blood;
>
> "*(2)* All allotted lands of adult mixed bloods of three-quarters or more Indian blood.
>
> "*(3)* All lands of adult full-blood allottees."

It is clear by reviewing the various Acts of Congress which gradually removed restrictions against alienation of lands of the allottees of Five Civilized Tribes, that Congress in passing section 9 of the Act of May 27, 1908, *supra,* not only intended that the death of the allottee would remove all restrictions against alienation of such lands by the heirs, but also it is equally clear that by the proviso of section 9, to the effect that conveyances of such heirs should be approved by the County Courts of Oklahoma, *Congress intended to thereby release the full-blood heir from all further federal supervision over a sale or lease of the lands inherited by the full-blood heir.*

Congress realized that the Indian heir was competent as a general rule to transact his own business, because for tho two years preceding the passage of the 1908 Act, conveyances of land of this class of Indians had been presented to the Secretary of the Interior for approval under the terms of section 22 of the Act of 1906. The records of the Indian Department during those two years showed that in practically all cases where the full-blood heir sold his inherited lands and their deeds of conveyances were presented to the Secretary of the Interior for approval, his investigation developed the fact that the Indian had made a fair trade and the conveyances were almost invariably approved by the Secretary of the Interior. Of course there were a few instances where the transaction was not approved but there are many instances where transactions made by white people would not be approved if presented to some disinterested third party for approval. So Congress decided that this class of Indians should be turned loose from further federal supervision and therefore inserted section 9 in the Act of 1908. While Congress contemplated the sale of lands inherited by full-blood Indians of the Five Civilized Tribes should be free of all further supervision of the Secretary of the Interior, yet in order to safeguard those few Indians who might not make a fair trade, provided that the conveyances should be approved by the County Courts of Oklaho-

ma. The supervision of the Secretary of the Interior and of all his subordinates over such conveyances were by this act rescinded and abrogated. He has no further jurisdiction or authority to supervise leases or sale of lands inherited by full-blood Indians.

If, during his lifetime, the allottee had not leased his land for oil and gas mining purposes, upon his death all restrictions and supervision to approve a lease or sale of such inherited land by the full-blood heir, insofar as the Secretary of the Interior is concerned, is rescinded. The full-blood Indian heir can sell his land or lease his land without supervision of the Secretary of the Interior. Does not the same rule apply where the land was leased during the lifetime of the allottee? Does not the death of the allottee operate to remove all further supervision over his lease, at least insofar as the Secretary of the Interior or Indian Agent is concerned? We certainly think it does. There is nothing in the Acts of Congress to the effect that where lands were leased under the supervision of the Secretary of the Interior during the lifetime of the allottee, that after the allottee's death the Secretary of the Interior shall continue to retain jurisdiction or continue to supervise the lease on such lands inherited by the heir where the heir is of full-blood. We think under the terms of the Acts of Congress that the supervision of the Indian Department ceased over these lands immediately upon the

death of the allottee, regardless of whether the land was leased by the allottee during his lifetime or not. There is nothing in the Acts of Congress that provide that this class of lands shall continue to be subject to the supervision of the Secretary of the Interior simply because the allottee happened to lease same during his lifetime.

Furthermore, the lease executed by Samuel Richard during his lifetime upon the land in controversy plainly provides, in paragraph 12, "in event restrictions of alienation shall be removed from the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement," and then continues to provide that all payments should thereafter be paid to the then owner of the land direct instead of to the United States Indian Superintendent. All restriction against alienation of the land covered by this lease is removed by the death of Samuel Richard, so far as the Secretary of the Interior is concerned. He has no supervision over the sale of the entire fee simple title to the land by Eastman Richard. Eastman Richard can sell the land free of all restrictions against alienation so far as the Secretary of the Interior is concerned. If the land had not been leased by Samuel Richard during his lifetime, Eastman Richard could now make a lease on same without supervision of the

Secretary of the Interior and could collect the bonus money for same, as well as collect the daily rents and profits accruing from the sale of the oil extracted from the land. If he could do this, if the lease had not been executed during the lifetime of Samuel Richard, why should he now be prevented from collecting the daily rents and profits accruing from the lands since the death of Samuel Richard? Why should the Secretary of the Interior retain jurisdiction over this lease? Indeed Eastman Richard can agree with the present holder of the lease on this land for the lessee to surrender the present lease (see paragraph 7 of lease Rec. p. 15) and Eastman Richard as sole heir of Samuel Richard can execute to the present holder of the lease on this land, a new lease providing for the payment by the lessee direct to Eastman Richard of all royalties accruing from the sale of the oil extracted from this land. The Secretary can not prevent this being done, nor could the Secretary collect the rents and royalties. There is nothing in the Acts of Congress giving the Secretary of the Interior, after the death of the allottee, authority to continue to supervise the collection of royalties accruing from lands inherited by full-blood Indian heirs, where the allottee executed a lease on the land during his life time any more than there is any provision in the Acts of Congress giving the Secretary of the Interior authority to supervise and approve the sale of the land,

or sale of a lease for oil purposes, and collection of royalties accruing from sale of oil extracted from the land, when the adult full-blood heir leases the land after the allottee's death.

In the instant case the administrators appointed by the County Court of McIntosh County, which had been by the acts of Congress vested with authority to administer the estate of the deceased lessor, became and still are the only persons entitled by law to receive these funds, and they are fully authorized by the various Acts of Congress and by the laws of the State of Oklahoma to accept, receive and administer these funds.

It would be error to hold that the defendants are now entitled to withhold from plaintiff the moneys accrued as royalties collected from the allotment of Samuel Richard, deceased, prior to the death of said Samuel Richard.

What has been stated heretofore in this brief under the propositions, *first*, that the death of Samuel Richard removed all restrictions against alienation, and, *second*, that upon the death of Samuel Richard all Governmental restrictions were removed, and *thirdly*, that irrespective of how the court should hold on these first and second propositions, yet upon the death of Samuel Richard all supervision over

the land by the Secretary of the Interior ceased, is also applicable under this proposition.

Under section 9 of 1908 Act, if any one has jurisdiction over this allotment of land since the death of Samuel Richard, it is the County Court of McIntosh County, Oklahoma, because the Act provides that the conveyance of the full-blood heir shall be approved by the County Court and if this be construed a restriction to the extent of giving any one any supervisory power over the land, other than the approval of a conveyance, that supervisory power would be in the County Court of the State of Oklahoma. The authority and power theretofore granted the Secretary of the Interior by section 22 of the 1906 Act, to supervise the conveyances was rescinded by the Act of 1908. *(United States* v. *Knight, supra.)*

During the lifetime of Samuel Richard the Secretary of the Interior had the supervisory power over his allotment because the land was restricted or inalienable and by reason of the fact that the land was inalienable by the allottee, the Secretary had the right to supervise same. The Secretary prescribed rules and regulations giving him authority to designate that the Indian Agency of Muskogee, Oklahoma, should collect the money during the lifetime of the allottee and to withhold the money, but these rulings of the Secretary cease upon the death of the allottee.

Under the Act of Congress of 1908, after the death of the allottee the supervision of the Secretary of the Interior to prevent the sale of the land by an Indian heir ceased; the heir of Samuel Richard can sell the inherited land without the consent of the Secretary of the Interior. No ruling that the Secretary of the Interior might have made during the lifetime of the allottee, attempting to continue restrictions against alienation of the land by the heirs of Samuel Richard, would be valid. If this could be done, the Secretary of the Interior, would have the right to adopt rulings that would extend restrictions on the land after the allottee's death, irrespective of the degree of Indian blood of the heir, in violation of the Acts of Congress which provide that the restrictions are removed upon the death of the allottee. No one contends that the Secretary of the Interior has such power. No one has the power to impose restrictions or extend restrictions against alienation of these lands except Congress by passing legislation to that effect. The Secretary of the Interior has no such power. Congress is the only body that can impose restrictions against the disposition of any property of the Indians of the Five Civilized Tribes. The Secretary of the Interior has no such power. To hold that the amendment to Rule 25, *supra,* adopted by the Secretary of the Interior gives his subordinate, the Indian Superintendent, authority to withhold from the heirs of Samuel

Richard, after his death, the moneys collected from sale of oil extracted from the lands before his death, would have the effect of saying that the Secretary of the Interior had the power to extend restrictions against the alienation of the property of the Indian beyond those restrictions imposed by Congress.

This amended Rule 25 can have effect only upon the *heirs* who continued, after the death of the allottee, to be subject to the supervision of the Secretary of the Interior under the PROVISIONS OF THE ACTS OF CONGRESS.

The only class of heirs, whose inherited lands continued to be subject to the jurisdiction of the Secretary of the Interior, after the death of the allottee, is those homesteads which were inherited by children, born after the Act of March 4, 1906, from allottees, enrolled as one-half or more degree Indian blood and which homesteads are *inalienable* by these children until 1931.

Lands inherited by adult full-blood Indian heirs, are not subject to supervision of the Secretary of the Interior. The death of the allottee operated to remove restrictions, with the only proviso that the conveyances of the inherited lands by full-blood Indian heirs are subject to approval by the COUNTY COURTS. The act does not provide for supervision of the Secretary of the Interior over this class of inherited lands.

Even though it should be held that the Secretary had the arbitrary right and power, after the execution of the lease and contract to change the terms of the contract as to the payments of the royalty accruing thereunder, by the adoption of the amendment to the Rule 25, on Nov. 29, 1912, we say that the Secretary had no power to make a rule and regulation which would in effect restrict the moneys and the properties of the allotted lands beyond the terms of restriction and beyond the terms of inalienability thereof as were prescribed by the Act of Congress at the time the lease was executed, the law then in force by Congress, which has not been changed to this date, was that all restrictions against alienation of the land were removed upon the death of the allottee. The Secretary of the Interior, by the amended rule, has attempted to impower himself with the right to hold these moneys as restricted properties beyond the time of the death of the allottee, by the insertion in the rule of the words "His heirs," and it will be observed that the rule did not specify that "His heirs" referred to were of full blood or were of less than full blood. Therefore if the rule is of valid force, it is just as binding on heirs of less than full blood as heirs of full blood.

Suppose for example that the Indian lessor was of full blood; that his wife is of no Indian blood; that he had a child born before March 4, 1906, who

would therefore be of one-half Indian blood; that the lessor or allottee died leaving his wife and child. His wife is not of Indian blood and his child, an adult, is of only one-half Indian blood. Section 9 of 1908 Act upon the death of the allottee removes all restrictions, so far as these heirs are concerned, yet under the amendment to Rule 25, if valid and enforceable, the Secretary has just as much right under this rule to continue to control the royalties collected from the lessor's land and to withhold payment thereof from these *unrestricted heirs*, as he would have the right to withhold payment of funds from the full blood heirs and we do not think for a moment that this court would ever hold that he has such right.

As stated before, Eastman Richard, as the sole heir of Samuel Richard, can sell the fee simple title to this land and collect the money for which he agrees to sell it, and the Secretary not only cannot prevent him from selling, but the Secretary or his subordinate, cannot control the disposition of the moneys received by Eastman Richard from the sale of the fee in the land, if he sells it. To hold that Eastman Richard can sell the entire fee in the land, but cannot collect the proceeds of sale of the oil extracted from the land is, to our minds, entirely inconsistent, and we do not anticipate that this court will sustain such a contention.

The amendment to Rule 25 does not give the defendants right to continue holding moneys collected prior to death of Samuel Richard, or to continue collecting moneys from sale of oil since the death of Samuel Richard, because upon the death of Samuel Richard supervision of the Secretary and of the defendants ceased under the provisions of section 9 of Act 1908, and the Secretary had no power to adopt a rule imposing restrictions on lands or properties beyond the time fixed by Congressional laws.

In the lower courts counsel for defendants, in support of their contention that the Secretary of the Interior has the power to adopt the amendment to Rule 25, *supra*, which was adopted on November 29, 1912, quoted and argued extensively from the case of *United States* v. *Thurston County, Nebraska*, 143 Fed. 287; however, it will be observed that the *Thurston* case, *supra*, is one where under the Act of May 27, 1902 (32 Stat. 245), the lands of the allottees of the Winnebago Tribe of Indians "were held *in trust* by the United States for a period of 25 years for the sole use and benefit of the Indian to whom the allotment shall have been made, *or in case of the decease of his heirs.*"

Under the law applicable in that case, the lands were held in trust by the United States for a full period of 25 years regardless of whether the allottee

died or not; the lands were held in trust by the United States for the full period of 25 years, both during the lifetime of the allottee as well as after his death. That law gave the specific right to hold his land in trust for the heirs of the allottee for a full period of 25 years.

There is no provision in the Acts of Congress pertaining to the affairs of the Five Civilized Tribes of Indians giving the United States power to hold the land in trust after the death of the allottee for the heirs for 25 years or any other period of time; on the contrary, the Act of Congress covering this allotment of a Creek Indian of the Five Civilized Tribes specifically provides that the *death of the allottee shall remove the restrictions against alienation.* In the *Thurston* case the Secretary had the power to approve conveyances and right to adopt rules that would apply for a full period of 25 years, and the court in that case rightly held that the money was non-taxable. But that case is clearly different from this case and is not a case in point. The *Thurston* case, in effect, only sustains the contention that the Secretary of the Interior had the right to adopt a rule giving the Indian Agent the right to withhold funds during the lifetime of Samuel Richard. We do not find fault with this, but we do contend that no rule made by the Secretary of the Interior can give him authority to supervise lands

after restrictions are removed by Congressional laws.

However, inasmuch as counsel for the appellants herein, have made no reference in their brief, to the *Thurston County* case, *supra*, we take it that they have abandoned the contention made by them in the lower courts that the *Thurston County* case is a case in point upon the question here involved.

In our case here, the Secretary of the Interior by the amendment to Rule 25 (while he may have had the power to prescribe how the moneys should be supervised during the *lifetime* of Samuel Richard while under the law the land was subject to supervision by the Secretary of the Interior) attempted to prescribe that *after* the death of Samuel Richard that he (the Secretary) could continue to supervise the property in the hands of the heirs. This was an attempt on the part of the Secretary of the Interior to adopt a ruling that would impose a restriction on a certain class of lands and property of Indians from which restrictions were removed by the Acts of Congress. The rule can have no legal or binding force or effect, as regards the withholding from the heirs, the moneys collected from this land *after* the death of Samuel Richard, because under the Act of Congress of 1908, *supra*, the supervision of the Secretary ceased upon the death of the allottee; the Secretary cannot adopt a rule that would give him pow-

er to supervise lands of a class of Indians that are not restricted, nor could he adopt a rule that would give him legal power to supervise lands after his right to supervise same under the Acts of Congress ceased.

To uphold such a contention would be to hold that the Secretary has the right to enact rules that would give him authority g r e a t e r than that prescribed by Congress. If the Secretary has the power to adopt a rule giving him right to continue, after the removal of restrictions, to supervise lands of unrestricted Indians, he would have the right to adopt a ruling to the effect that the lands will continue to be restricted, even after the time set by Congress on which the restrictions will be removed. Certainly no one has the right to extend restrictions against alienation of land except Congress. Certainly the Secretary of the Interior has no power to impose restrictions on lands or properties where under the law the restrictions have ceased under the provisions of the Act of Congress. Certainly the Secretary has no legal right to legislate rules that would have greater force and effect than the laws prescribed by Congress.

If it be held that because of the adoption of amendments to Rule 25, *supra*, the Secretary of the Interior still has jurisdiction to withhold from East-

man Richard the moneys collected from sale of oil from this land prior to the death of Samuel Richard, as well as to continue to collect moneys received for sale of oil extracted from the lands after the death of Samuel Richard, the rule would equally apply to lands inherited by Indian heirs of less than full-blood.

Certainly upon the death of the allottee all restrictions against alienation by heirs of less than full-blood are removed and the authority held by the Secretary of the Interior over the allottee during the allottee's lifetime ceased. If this be true (and it is), the authority possessed by the Secretary of the Interior during the lifetime of Samuel Richard ceased upon Samuel's death, and the fact that a deed of conveyance by the heir, Eastman Richard, requires the approval of the County Court, does not give the Secretary of the Interior any power to supervise the land or a conveyance of same. Under the act it plainly provides that the County Courts of Oklahoma, shall have the power to supervise such conveyances; and the courts have repeatedly held in construing this Act of 1908, that it was the intention of Congress that all further jurisdiction of the Secretary of the Interior to supervise such class of lands cease. See *United States* v. *Knight*, 206 Fed. 145, etc., *supra*.

The authority to hold the royalties during the lifetime of the lessor was contractual only, arising out of a stipulation in the lease, which stipulation is not binding on the heirs.

The Indian Superintendant was made a mere agent to collect the royalties during the lifetime of the lessor and upon the death of the lessor became a bailee without authority over the funds except to pay to those authorized to receive the same. Since there is no statute authorizing the withholding of the funds the superintendent and his cashier must rely on the contract. Upon familiar principles the lessor could not bind his heirs by such a stipulation.

It would be error to hold as a matter of law that the defendants are now entitled to withhold from plaintiff the moneys collected by them as royalty from the allotment of Samuel Richard, deceased, which accrued from sale of oil extracted SINCE the death of Samuel Richard.

This action is not only to recover the moneys collected by the defendants during the lifetime of Samuel Richard, upon the ground that, after the death of Samuel Richard, his father, Eastman Richard, as his sole heir is entitled to handle this money inherited by him without supervision of the Secretary of the Interior, or his subordinate, *but is also*

to recover the moneys collected by the defendants from sale of oil extracted from this land since the death of Samuel Richard, as well as for an order restraining the defendants from continuing to collect these rents and royalties.

After the death of Samuel Richard all authority of the defendants or of the Secretary of the Interior to supervise a sale by Eastman Richard of the entire fee title in this land, was immediately rescinded by virtue of section 9 of the Act of 1908, *supra.* Eastman Richard having this right to convey his land and collect the proceeds of sale without supervision of the defendants, certainly had and has the right to sell his royalty oil (or let his lessee sell same) and collect the proceeds of sale of the same, without supervision of the defendants, insofar as the sale of oil extracted and sold *since* the death of Samuel Richard, is concerned. It is a well established principle of law "that the greater includes the less." We can certainly see no consistent reasoning for a contention that admits in one breath that Eastman Richard can sell the entire fee in the land but in the same breath denies that Eastman Richard can sell his oil and collect moneys representing proceeds of sale of oil extracted from the land—both without the supervision of the Secretary of the Interior or the defendants.

Much that has been said above in this brief relative to the land not being "restricted" land, nor subject to governmental restrictions, as well as the fact that the moneys collected prior to the death of Samuel Richard are not subject to be withheld by defendants after the death of the allottee, Samuel Richard, in spite of Rule 25, is applicable under this proposition, because if this court holds that the contentions of plaintiffs are correct in any one of these points, plaintiffs are correct in this assertion. However, even should this land still be considered as restricted land, in the sense intended by Congress, or still "subject to government restrictions" and should it further be held that the amendment to Rule 25, *supra*, gives the defendants authority to withhold the moneys collected *prior* to the death of Samuel Richard, *yet there is absolutely nothing, either in the Acts of Congress or in the rules adopted by the Secretary of the Interior that gives the defendants the right to collect the royalties accrued and now accruing since the death of Samuel Richard.* In the first place, upon the death of Samuel Richard, all supervision of the defendants and of the Secretary of the Interior ceased by virtue of Sec. 9, *supra*, for even should it be determined that the proviso to Sec. 9 requiring the deed of conveyance of the land of the heir to be approved by the County Court is a federal restriction, simply because Congress in

its law designated the County Courts of Oklahoma should approve such conveyances, yet there is no law that provides that the land shall be subject *to supervision of the Secretary of the Interior nor of the defendants;* in fact, the law, plainly to the contrary, provides that the supervising power given by the Act of 1906 to the Secretary of the Interior to approve such conveyances on such lands is now since the Act of 1908 vested in the County Courts of Oklahoma. Therefore, neither the defendants nor the Secretary have any right to supervise a sale of this land after death of Samuel Richard, and by the same reasoning, they have no right to supervise the collection of the royalties accruing from the sale of oil extracted and sold *since* the allottee's death; in the second place, the amendment to Rule 25, *supra*, even though made while the land was restricted land has not sufficient legal effect to hold moneys accruing from lands which after the death of the allottee are not subject to control of the Secretary of the Interior.

To hold that Eastman Richard, the sole and only heir of Samuel Richard, cannot collect the moneys representing the sale of oil extracted and sold from this inherited land, since the death of Samuel Richard, as well as collect the moneys now daily accruing, and that will continue to accrue, from sale of oil extracted from this land, and to say that the

defendants can collect the same and withhold same from plaintiffs is, in substance, to say to Eastman Richard:

> "Eastman Richard, you have the legal right to sell this valuable land constituting the allotment of Samuel Richard, which you inherited at his death, and you can probably receive $500,000.00 for a sale of same; and you can make this sale and receive this money free of all supervision of the Secretary of the Interior and invest the money as you desire, free of all supervision,"

BUT

> "If you do *not* sell this valuable inheritance, you cannot legally collect the rents and royalties daily accruing from this land, but the Secretary of the Interior or the defendants, can and will continue to collect same and hold the money as long as they feel disposed to hold it."

"You can sell the fee in the land but cannot sell the oil extracted from the land." This would mean that if Eastman Richard ever expects to handle this money which rightfully belongs to him he will be forced to sell his valuable oil lands in order to get any benefits from his inheritance.

After the death of Samuel Richard, Eastman Richard had numbers of opportunities to sell this land for a valuable money consideration to be paid direct in his hands. Had he desired he could have accepted these attractive offers to purchase his land,

and could have executed his conveyance, had same approved by the County Court of McIntosh County, Oklahoma, and received his money and have same today and receive the benefit from same—all without either supervision, sanction or approval of the Secretary of the Interior or the defendants. Eastman Richard, being the shrewd business man that he is, no doubt, figures that as a good business proposition and investment, the collection of the daily royalties due him as the owner of the land is a far better business policy. If the oil companies can afford to pay a large price for the fee in the land and expect to make a large profit in the transaction by the collection of the proceeds of the sale of the one-eighth (1/8) royalty oil daily extracted from the land, which is due the owner of the fee in the land, no doubt as a business matter, Eastman Richard figures that he can hold the title to the land and collect his royalties and realize more money from his inheritance. If it be held that he cannot collect these royalties, HE WILL BE FORCED AND COMPELLED TO SELL HIS LAND, in order to get any benefit from his inheritance. Why should he be compelled to sell his valuable inheritance at a sacrifice in order to collect the benefits of his inheritance? Why place such a construction upon the laws of Congress, as require such as this?

Conclusion.

In conclusion, we must earnestly urge to this court that we believe that upon the death of Samuel Richard, the defendants had no further right to collect the moneys accrued since his death nor those moneys which are daily accruing and which will continue to daily accrue from the sale of oil extracted and being extracted from this valuable tract of land, but we believe that Eastman Richard, as the sole heir of Samuel Richard is entitled to collect these moneys; furthermore, that in addition to this we believe that plaintiffs are entitled to collect from the defendants all moneys held by them representing proceeds of sale of oil extracted from this land *prior* to the death of Samuel Richard; that upon Samuel Richard's death the defendants' authority to hold this money ceased; furthermore, we believe that upon the death of Samuel Richard all further supervision over this land by the Secretary of the Interior, and of the defendants, ceased by virtue of the Act of May 27, 1908, *supra*, and for the further reason that the amendment to Rule 25 is void as discussed in our second proposition, and we must respectfully ask this court to affirm the judgment rendered by the Circuit Court of Appeals in case No. 313 (Rec., pp. 43-47) and order a judgment to be rendered in favor of the plaintiffs as prayed for in the

petition in this cause, and to dismiss the appeal in case No. 563.

Respectfully submitted,

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April 14, 1919.

Counsel for Parties.

PARKER, PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, ET AL. *v.* RICHARD ET AL., CO-ADMINISTRATORS OF RICHARD.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 313, 563. Argued April 24, 1919.—Decided June 2, 1919.

Under § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312, providing "that the death of any allottee . . . shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee," lands of a deceased full-blood allottee, descended to a full-blood heir and not conveyed with the approval of such court, are "restricted lands" in the sense of § 2 of the same act, which provides that leases of "restricted lands" for oil, gas or other mining purposes may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by him, and not otherwise. P. 238.

The fact that by the proviso of § 9, *supra*, Congress authorized a state court—practically as a federal agency—to sanction conveyances, does not affect the force and operation of the restrictions while they remain. *Id.*

During the continuance of such restrictions, the duty to protect the interests of the full-blood heir by supervising the collection, care and disbursement of royalties arising from an oil and gas lease made under § 2, remains with the Secretary of the Interior. P. 239.

245 Fed. Rep. 330, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for appellants.

Mr. Britton H. Tabor and *Mr. James B. Lucas* for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to enjoin two representatives of the Secretary of the Interior—the Superintendent and the Cashier of the Five Civilized Tribes—from collecting future royalties on an oil and gas lease of land allotted to a Creek Indian and to compel them to surrender royalties already collected. In the District Court there was a decree for the defendants, which the Circuit Court of Appeals reversed, one judge dissenting. 245 Fed. Rep. 330. The District Court then complied with the mandate by entering a decree for the plaintiffs, and this the Circuit Court of Appeals declined to disturb. Appeals from the decisions of the latter bring the case here.

The questions to be considered are whether the land covered by the lease is land from which restrictions on alienation have been removed, and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of the royalties has terminated.

The land was part of the Creek tribal lands and was allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 Stat. 500, the allottee being a minor and an enrolled Indian of the full blood. In 1912, while he was yet a minor, the oil and gas lease was given by his guardian, the lease being approved by the court having jurisdiction of his estate and by the Secretary of the Interior. The allottee died in 1916, while still a minor, and left his father, a full-blood Creek Indian, as his only heir. Approximately $280,000 in royalties have accrued under the lease—part before and part since the allottee died. These royalties have been collected by the defendants pursuant to the terms of the lease and the regulations of the Secretary of the Interior and are being

held by them in trust under a provision in the regulations which authorizes them to retain and care for such funds "until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs." The plaintiffs are the administrators of the estate of the deceased allottee.

By § 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress declared that "all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." There was no such removal in this instance and it is conceded that at the date of the lease and at the time of allottee's death the alienation of the land was still restricted.

By § 2 of the same act Congress declared that "leases of restricted lands for oil, gas or other mining purposes . . . may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." The lease was given under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity. It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, that the royalties thereunder should be paid to his representatives, that, with exceptions not material here, the regulations as then or thereafter in force should be deemed part of the lease, and that in the event restrictions on alienation should be removed the

supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands.

One of the regulations prescribed by the Secretary deals with the payment to lessors, their guardians, heirs, etc., of moneys collected as royalties by his representatives and specially authorizes the latter, as before indicated, to withhold such payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. It is under this regulation that the royalties already collected are being retained. The record indicates that a considerable portion of them has been invested in interest-bearing bonds of the United States, but as the propriety of this is not called in question, it may be passed without further notice.

By the Act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared, in § 9, "that the death of any allottee . . . shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee." In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. Con-

veyances without its approval fall within the ban of the restrictions. That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the State. *Marcy* v. *Board of Commissioners*, 45 Oklahoma, 1. Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes.

In cases presenting the question whether lands inherited from allottees by full-blood Indian heirs are freed from restrictions by § 9, and thus brought within another provision in the same act declaring that land "from which restrictions have been or shall be removed" shall be taxable and subject to other civil burdens, the Supreme Court of the State and the federal court of that district have both held that under the proviso such land remains restricted in the hands of the full-blood heirs, and so is not within the taxing provision. *Marcy* v. *Board of Commissioners, supra; United States* v. *Shock*, 187 Fed. Rep. 870.

Entertaining a like view of the proviso, we conclude that the land covered by the lease is still restricted land.

As to the other question this is the situation:

Under the Act of 1908, as already shown, leases of "restricted lands" for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, "and not otherwise." The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior of the

collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some supervision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat., §§ 441, 463. *West* v. *Hitchcock*, 205 U. S. 80, 85. And see *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166. There is nothing to the contrary in the leasing provision or in any other of which we are aware. True, it is possible under the proviso in § 9 for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until the restrictions expire in regular course—April 26, 1931. There is nothing in the proviso indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the lease or the royalties. A purpose to do that doubtless would be plainly expressed.

In this situation we think the authority of the Secretary of the Interior to supervise the collection, care and disbursement of the royalties has not terminated.

Criticism is made of some of the regulations, but all that are material here seem to be well within the limits of the Secretary's authority, and the acts of his representatives in respect of the lease and the royalties, so far as questioned here, seem to be well within the regulations.

It results that the original decree in the District Court was right and should stand, and that the second decree in that court and those in the Circuit Court of Appeals must be reversed.

Decrees reversed.